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The Constitution in the Supreme Court: Article IV and Federal Powers, 1836-1864

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THE CONSTITUTION IN THE SUPREME COURT: ARTICLE IV AND FEDERAL POWERS, 1836-1864

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Continuing his critical analysis of the constitutional decisions of the Taney period, Professor Currie examines cases involving the privileges and immunities clause, fugitives from slavery and criminal prosecution, and intergovernmental immunities, as well as cases dealing with the scope of federal judicial and legislative powers. In these decisions, with the glaring exception of Scott v. Sandford, *he finds additional evidence that in general the Taney Court continued to enforce constitutional limitations vigorously against the states and to construe federal authority generously.*

In the preceding issue of the *Duke Law Journal* I examined a number of the constitutional decisions of the Supreme Court during the time when Roger B. Taney was Chief Justice.[1] The present article, the fifth installment of a critical examination of early Supreme Court constitutional decisions,[2] continues the inquiry.

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1. *See* Currie, *The Constitution in the Supreme Court: Contracts and Commerce, 1836-1864*, 1983 DUKE L.J. 471 [hereinafter cited as Currie, *Contracts and Commerce, 1836-1864*].

2. *See* Currie, *The Constitution in the Supreme Court, 1789-1801*, 48 U. CHI. L. REV. 819 (1981) [hereinafter cited as Currie, *Supreme Court, 1789-1801*]; Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646 (1982) [hereinafter cited as Currie, *Federal Courts, 1801-1835*]; Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835*, 49 U. CHI. L. REV. 887 (1982) [hereinafter cited as Currie, *States and Congress, 1801-1835*]; Currie, *Contracts and Commerce, 1836-1864*, *supra* note 1.

I. LIMITATIONS ON STATE POWER

A. *The Privileges and Immunities Clause.*

Incorporated in Georgia, the Bank of Augusta sued in federal circuit court on a bill of exchange it had purchased in Alabama. The lower court held for the defendant on the ground that foreign corporations had no authority to buy bills in Alabama; in the 1839 Taney opinion in *Bank of Augusta v. Earle* the Supreme Court reversed.[3]

Dissenting alone, McKinley adhered to the position he had taken on circuit:[4] it was up to Alabama to decide whether or not foreign corporations could do business there, and by imposing strict limits on the incorporation of banks the Alabama Constitution expressed a policy inconsistent with purchases by foreign banking corporations.[5] Taney, on the other hand, concluded that Alabama law allowed the Georgia bank to buy bills of exchange,[6] and that was all he needed to say.

Following Marshall's pattern, however, Taney began his opinion by deciding a fundamental constitutional question that proved purely hypothetical: he agreed with McKinley that Alabama could have forbidden the transaction.[7] Ignoring a plausible commerce clause argument,[8] Taney announced in two quick paragraphs that a prohibition on

3. 38 U.S. (13 Pet.) 519 (1839). For a good background explanation, see G. HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW 42-59 (1918).

4. Thompson was absent. 38 U.S. (13 Pet.) at xv. McKinley, it has been observed, "seldom wrote opinions of any kind." 5 C. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 120 (1974).

5. "Can it be believed, that [Alabama] intended to protect herself against the encroachments of her own legislature only, and to leave herself exposed to the encroachments of all her sister states?" *Bank of Augusta*, 38 U.S. (13 Pet.) at 605. McKinley also argued that the legislature itself could not have recognized the Georgia corporation because it did not meet the standards for an Alabama charter, and thus that a court could not recognize it either. *Id.* at 599-604.

6. "[T]he state never intended by its constitution to interfere with the right of purchasing or selling bills of exchange," but only to limit "the power of the legislature, in relation to banking corporations"; otherwise "no individual citizen of Alabama could purchase such a bill." *Id.* at 595-96.

7. Baldwin concurred in the judgment. *Id.* at 597. His opinion was unreported, but a newspaper account has been cited to show that he thought the privileges and immunities clause forbade exclusion of a foreign corporation. *See* 5 C. SWISHER, *supra* note 4, at 120.

8. *See Bank of Augusta*, 38 U.S. (13 Pet.) at 531-32 (Mr. Ogden) ("bills of exchange are one of the great means of carrying on the commerce of the world"). No one relied on the full faith and credit clause; the defendants noted that the clause "seems to be as yet confined to judicial acts," and thus did not require recognition of foreign corporate charters. *Id.* at 570 (Mr. Ingersoll). For later decisions indicating that the full faith and credit clause requires respect for state statutes as well as judicial decisions under certain circumstances, see generally B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 188-282, 318-19 (1963). Whether the circumstances would require Alabama to defer to Georgia law today under the full faith and credit clause is nevertheless highly doubtful. *See id.* at 188-282.

contracts by foreign corporations would not run afoul of article IV's provision that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Though the Court had held in *Bank of the United States v. Deveaux*[9] that citizens of a state did not lose the right to invoke the diversity jurisdiction by assuming the corporate form,[10] that decision was "confincd . . . to a question of jurisdiction": the privileges and immunities clause was not meant to give outsiders "greater privileges than are enjoyed by the citizens of the state itself," and the liability of those citizens—unlike that of members of a foreign corporation—was not limited to their investment.[11]

It may have been fear of such preferential treatment that led Marshall in *Deveaux* to deny that the corporation was a "citizen" for diversity purposes.[12] It is not clear, however, that the outsiders in *Bank of Augusta* would have enjoyed a preferential position if the Court had held either that the corporation itself was a citizen,[13] or that its contracts, like its suits, belonged to its members. As its language suggests, the privileges and immunities clause has since been held to forbid only discrimination against outsiders as such,[14] leaving Alabama free in any

9. 9 U.S. (5 Cranch) 61 (1809); *see* Currie, *Federal Courts, 1801-1835*, *supra* note 2, at 675-79.

10. 9 U.S. (5 Cranch) at 87-92.

11. *Bank of Augusta*, 38 U.S. (13 Pet.) at 586.

12. *See* G. HENDERSON, *supra* note 3, at 56-57; Currie, *Federal Courts, 1801-1835*, *supra* note 2, at 677.

13. No doubt because of *Deveaux*, it was not even argued that the corporation was a citizen.

14. *See, e.g.*, Toomer v. Witsell, 334 U.S. 385, 395 (1948); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869). Dissenting in the Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 118 (1873), Justice Bradley suggested that the clause might be more than "a guarantee of mere equality," and one commentator has argued that it would be "only . . . a small step" beyond Justice Washington's famous decision in Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230), to hold that article IV gave citizens fundamental rights against their own states as well. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-32, at 406 (1978). Washington's solo performance in *Corfield*, however, concluded no more than that the clause allows discrimination against an outsider if the right in question is not "fundamental." It seems more than a "small step" to convert this passage narrowing the clause into one expanding it, or to transform what Washington termed a necessary condition into a sufficient one.

The privileges and immunities clause was not discussed in the Convention, but its placement among other provisions plainly concerned with interstate relations (full faith and credit, extradition, and fugitive slaves) and its origin in a provision of the Articles of Confederation expressly desigued "to secure and perpetuate mutual friendship and intercourse among the people of the different States" suggest that the conventional interpretation is correct. ARTICLES OF CONFEDERATION art. 4, § 1.

Charles Pinckney, in a paper written at the time of the Convention, seemed to imply equality for outsiders when he spoke of the clause as "extending the rights of Citizens of each State, throughout the United States." *See* C. PINCKNEY, OBSERVATIONS ON THE PLAN OF GOVERNMENT SUBMITTED TO THE FEDERAL CONVENTION (1787), *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 106, 113 (M. Farrand ed. 1966) [hereinafter cited as 3 CONVENTION

event to hold the members of a foreign banking corporation individually responsible for corporate debts or to limit the number of banks,[15] so long as it applied the same rules to both local and foreign bankers.[16] Thus Taney seems to have erred in believing a narrow definition of citizenship necessary to avoid preferences for outsiders, and if his decision meant that Alabama could deny the privilege of acting in corporate form to outsiders while allowing it to insiders, the decision contradicted the purpose of the privileges and immunities clause.

Even if the Alabama Constitution did forbid the purchase of bills by foreign banking corporations, however, it apparently did not disadvantage citizens of other states. Outsiders remained free to buy bills in their individual capacities;[17] Alabama citizens could do no more unless they met the stringent requirements necessary to obtain a charter. Furthermore, the limited privileges of incorporation in Alabama were evidently equally available to out-of-staters.[18] Thus, not only did Taney insist on deciding a constitutional question he did not have to reach, but he could have achieved the same result without making the uncomfortable ruling that citizenship should be determined in inconsistent ways under adjacent articles of the Constitution.[19]

The Court faced the privileges and immunities clause again in 1856, when it unanimously held in *Conner v. Elliott*[20] that Louisiana

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RECORDS]. So did *Federalist No. 80*, in explaining that diversity jurisdiction (which requires that an outsider be a party) was meant to assure "that equality of privileges and immunities to which the citizens of the union will be entitled." THE FEDERALIST No. 80, at 537 (A. Hamilton) (J. Cooke ed. 1961). Story flatly said that the clause, removing the disabilities of alienage, gave outsiders "all the privileges and immunities, which the citizens of the same state would be entitled to under the same circumstances." 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1800, at 674-75 (Boston 1833).

15. See the argument of the Court in Paul v. Virginia, 75 U.S. (8 Wall.) 168, 181-82 (1869), in holding that corporations are not "citizens."

16. *See Bank of Augusta*, 38 U.S. (13 Pet.) at 593 (quoting with minor inaccuracy ALA. CONST. of 1819, art. VI, *Establishment of Banks*, § 1, cl. 3 (" 'The state and individual stockholders shall be liable respectively for the debts of the bank, in proportion to their stock holden therein.' ")); T. SERGEANT, CONSTITUTIONAL LAW 394 (2d ed. Philadelphia 1830) (1st ed. Philadelphia 1822) (citing the New York steamboat case of Livingston v. Van Ingen, 9 Johns. 506 (N.Y. 1812), as holding that the clause "means only, that citizens of other states shall have *equal* rights with the citizens of a particular state" and "does not therefore, affect the right of the legislature of a state, to grant to individuals an exclusive privilege of navigating the waters").

17. *See Bank of Augusta*, 38 U.S. (13 Pet.) at 603 (McKinley, J., dissenting).

18. The constitution spoke generally of "individual stockholders," requiring only that "[a]t least two-fifths of the capital stock shall be reserved for the state." *Id.* at 593.

19. *See* F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 65 (1937) ("Taney rejected the applicability of this clause to the corporation, not because textual analysis or controlling precedents forbade. He did so because, having the power to choose, he chose to deny, by reason of his economic and political outlook, the enhancement of strength that such constitutional protection would give.").

20. 59 U.S. (18 How.) 591 (1856).

did not have to give a Mississippi widow the same interest in her husband's Louisiana realty that a Louisiana widow would have enjoyed. Article IV, wrote Curtis in his usual terse way, protected only those privileges "which belong to citizenship."[21] Community property in Louisiana was based not upon Louisiana citizenship but upon marriage or domicile there, in accord with the traditional choice-of-law rule referring contract questions to the local law of the place where the contract was made or performed:

> The laws of Louisiana affix certain incidents to a contract of marriage there made, or there partly or wholly executed, not because those who enter into such contracts are citizens of the State, but because they there make or perform the contract. . . . The law does not discriminate betwcen citizens of the State and other persons . . . .[22]

Curtis seems correct that neutral choice-of-law rules such as those referring to the place of contracting do not discriminate against outsiders as such and thus do not violate the privileges and immunities clause. His conclusion that the place-of-performance rule was equally neutral, however, raises more interesting problems, because he equated the place a marriage agreement was performed with "the domicile of the marriage."[23] Because state citizenship depends not on official certification but on domicile,[24] this classification seems precisely what article IV forbids.[25] Thus Curtis seemed to be saying that, despite the

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21. *Id.* at 593.

22. *Id.* at 594. The statement that community property was not among the " 'privileges of a citizen' " in Louisiana, *id.* at 593, has reminded at least two commentators of Justice Washington's famous circuit court dictum in Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230), that the clause protects only those privileges which are "fundamental." *See* B. CURRIE, *supra* note 8, at 498. The Court itself later suggested that *Conner* had established that rights like community property and dower lay outside the clause entirely. *See* Ferry v. Spokane, P. & S. Ry., 258 U.S. 314, 318 (1922). One recent decision has resuscitated the limitation to "fundamental" privileges in the teeth of article IV's reference to "all," *see* Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 388 (1978) (over three dissents), but I do not think Curtis meant to say community property was never protected. His reason for holding the right not one belonging to citizenship was that it was not defined in terms of citizenship; he seems to have upheld the law because it did not discriminate against citizens of other states. For an approving view of decisions before *Baldwin* that extended protection to "ordinary legal rights," see B. CURRIE, *supra* note 8, at 460-67.

23. *Conner*, 59 U.S. (18 How.) at 593.

24. *See, e.g.*, Williamson v. Osenton, 232 U.S. 619, 624 (1914) (for purposes of diversity jurisdiction). The fourteenth amendment, adopted after *Conner*, makes Americans citizens of "the State wherein they reside." U.S. CONST. amend. XIV, § 1.

25. *See* Blake v. McClung, 172 U.S. 239, 247 (1898) (striking down a classification favoring local "residents" after holding it referred "to those whose residence in Tennessee was such as indicated that their permanent home or habitation was there, without any present intention of removing therefrom, and having the intention, when absent from that State, to return thereto; such residence as appertained to or inhered in citizenship"). For a discussion of inconsistent decisions on the question whether mere residence is the equivalent of domicile under article IV, see B.

language of the clause, a state could discriminate against citizens of other states under some circumstances. He also suggested why: surely a state may deem it "proper not to interfere . . . with the relations of married persons outside of that State."[26] Just how to reconcile this conclusion with the language of the clause is not clear, but once more Curtis's instincts were sound. A literal reading requiring a state with lenient marriage or divorce laws to provide a haven for those hoping to circumvent the more restrictive rules of their own states would convert a provision designed to forestall interstate friction into a tool for exacerbating it.[27] Curtis certainly did not get to the bottom of the perplexing relationship between the privileges and immunities clause and interstate choice of law, but he does deserve credit for having doubted that the Framers meant to require one state to trample on the legitimate interests of another and for having been one of the first to perceive a problem for which we have yet to find a wholly satisfactory solution.

B. *Fugitive Slaves.*

Persons held in captivity had an understandable propensity to run away, and persons in areas without slavery had a similarly understandable tendency not to send them back. Consequently, article IV of the Constitution forbade any state to discharge fugitive slaves from their

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CURRIE, *supra* note 8, at 468-75, asserting that "[i]f it were possible to escape the constitutional restraint by the simple device of substituting residence for citizenship as the basis of classification, the clause would be rendered nearly meaningless." *Id.* at 470.

26. *Conner*, 59 U.S. (18 How.) at 594. Later decisions have carried this idea to the point of holding that both the due process clause and the full faith and credit clause *preclude* one state from regulating matters wholly the concern of another. The decisions are discussed in Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981), and in B. CURRIE, *supra* note 8, at 498-523. Obviously, one clause of the Constitution cannot be read to require what another forbids.

27. The Supreme Court has since managed to get around the problem by concluding that the privileges and immunities clause "does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it," thus evidently turning the clause into a prohibition on *unreasonable* discrimination against outsiders. Toomer v. Witsell, 334 U.S. 385, 396 (1948); *see also* Hicklin v. Orbeck, 437 U.S. 518, 525-26 (1978) (dictum); *Toomer*, 334 U.S. at 398; Chemung Canal Bank v. Lowery, 93 U.S. 72, 77 (1876) (upholding a provision tolling the statute of limitations only if the plaintiff's residence was local); L. TRIBE, *supra* note 14, §§ 6-32, 6-33, at 407-11. The tension between article IV and reasonable choice-of-law principles based upon domicile might have been resolved without taking such liberties: to refuse to apply local community property law to infringe rights created by the law of the state where the parties live is to classify people according to the laws of their own states, not on the basis that they are outsiders. Unfortunately this approach seems to prove too much, for it would allow exclusion of citizens of some states from benefits even if no interest of their own state so required. *See* B. CURRIE, *supra* note 8, at 508 ("[W]hen the law of a state provides benefits for its residents generally, the same benefits should [under the privileges and immunities clause] be extended to citizens of other states . . . . [This is so,] provided it can [be done] . . . without trespassing upon the interests of other states.").

"Service or Labour," and required that they "be delivered up on Claim of the Party to whom such Service or Labour may be due."[28] Congress implemented this clause in 1793 by authorizing the owner to arrest a fugitive and bring him before any federal judge or local magistrate for a determination of status.[29] In 1826 Pennsylvania passed a statute empowering its judges to enforce the federal law and making it a crime to abduct "any negro or mulatto from the state."[30] Under this law, a Pennsylvania jury convicted Edward Prigg of abducting a runaway slave. Reversing, the Supreme Court held the Pennsylvania law unconstitutional in the celebrated 1842 case of *Prigg v. Pennsylvania*.[31]

Story unnecessarily gave three different reasons for this conclusion. First, article IV gave the slaveowner everywhere the same right of ownership that he enjoyed in his own state, including "the right to seize and repossess the slave," and any state law that "interrupts, limits, delays or postpones" the obligation of service "operates, pro tanto, a discharge of the slave therefrom."[32] Second, the federal statute "cover[ed] the whole ground" and thus excluded even "auxiliary" state laws because "the legislation of Congress, in what it does prescribe, manifestly indicates, that it does not intend that there shall be any farther legislation to act upon the subject-matter."[33] Third, the need for uniformity dictated that only Congress could legislate on the subject, and no state legislation would have been valid even if Congress had not spoken.[34]

None of Story's three arguments will bear close scrutiny. First, the state law appeared to satisfy both provisions of article IV: it liberated no slaves, and it provided for sending them back to slavery. Despite echoes in modern due process decisions of Story's argument that delay effected a pro tanto discharge,[35] suspension of someone's rights is una-

28. U.S. CONST. art. IV, § 2.

29. Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302, 302-05.

30. Act of Mar. 25, 1826, ch. 50, 1826 Pa. Laws 150.

31. 41 U.S. (16 Pet.) 539 (1842). *See generally* 5 C. SWISHER, *supra* note 4, at 535-47. Near the beginning of the Court's opinion Story made a classic statement about constitutional interpretation:

> [P]erhaps, the safest rule of interpretation after all will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed.

Prigg, 41 U.S. (16 Pet.) at 610-11.

32. *Prigg*, 41 U.S. (16 Pet.) at 612-13.

33. *Id.* at 617-18.

34. *Id.* at 622-25. Baldwin concurred in the result but disagreed with the Court's reasons, without offering any of his own. *Id.* at 636. The other separate opinions are discussed *infra* notes 37-57 and accompanying text.

35. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972) (invalidating some pretrial attachments).

voidable when there are conflicting claims.[36] By commanding delivery only of a "Person held to Service or Labour" and only to "the Party to whom such Service or Labour may be due," article IV itself seemed to contemplate proceedings to determine the facts of slavery and ownership.[37] In short, as McLean argued in his separate opinion,[38] the Pennsylvania law seemed to be a conscientious effort to carry out the state's constitutional duties while protecting the rights of its free black population.[39]

Story's second and third arguments depended on a finding that Congress had power to legislate with respect to fugitive slaves. None of the Justices denied Story's presumption of congressional capacity. It was not at all clear, however, that Congress had such power, for the fugitive slave clause contained no express grant. In contrast, the explicit provisions for congressional enforcement of the full faith and credit clause of the same article and for the enactment of laws necessary and proper to the effectuation of powers elsewhere given to the federal government[40] arguably implied that when the Framers intended to give such authority they said so. As Marshall had noted, however, the necessary and proper clause does not seem to have been

36. The logic of Story's decision would apparently require the Solomonic judgment that if two masters claimed a slave, the slave must be delivered to both at the same time. *Cf. In re* Booth, 3 Wis. 1, 103 (1854) (opinion of Smith, J.) (*Prigg* meant that "[i]f I replevy my horse, my title to him is *discharged* pending the litigation"), *rev'd sub nom.*, Ableman v. Booth, 62 U.S. (21 How.) 506 (1859). Even today courts do not release a habeas corpus applicant before he has proved his claim. *See* 28 U.S.C. § 2243 (1976) (disposition after hearing).

37. U.S. CONST. art. IV, § 2. Congress held the same opinion, for it had provided for such determinations before the victim could be shipped across the state line. Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302, 303-05. Story's arguments seemed to imply that the federal act was also unconstitutional, though he relied on it elsewhere to preempt state law. *Prigg*, 41 U.S. (16 Pet.) at 622-25.

38. *Prigg*, 41 U.S. (16 Pet.) at 667-72. McLean did not say whether he was concurring or dissenting, and Wayne, with his penchant for summing up, *cf.* Currie, *Contracts and Commerce, 1836-1864*, *supra* note 1, at 531, 534 (discussing The Passenger Cases, 48 U.S. (7 How.) 282 (1849)), declared that all nine Justices found the Pennsylvania law unconstitutional. *Prigg*, 41 U.S. (16 Pet.) at 637. McLean did agree with Story that Congress possessed exclusive power to enforce the clause, but the only state provision actually in issue was that forbidding abduction, which McLean seemed to find valid. *Id.* at 661-63, 669. Thus McLean could have concurred only by finding that the provisions not in issue were unconstitutional and that the kidnapping provision was inseparable. He did not say this, however, and separability should have been a question of state law to be resolved by the state court.

39. *See* D. FEHRENBACHER, THE DRED SCOTT CASE 42 (1978); W. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 159 (1977). *But see* 5 C. SWISHER, *supra* note 4, at 547 ("it is hard to conceive that the Court might have decided . . . that the states might enact legislation interfering with the recapture of [known] fugitives"). There was no significant discussion of the fugitive slave clause in either the Philadelphia Convention or *The Federalist*.

40. U.S. CONST. art. I, § 8; U.S. CONST. art. IV, § 1.

intended to limit the powers Congress would otherwise have had.[41] Similarly, though citation to the analogous holding that the House of Representatives had implied contempt powers[42] would have strengthened his case, Story made a reasonably convincing argument that legislative implementing power was implied in the vague requirement that the fugitive be "delivered" upon "claim" by his owner.[43] At one point he even attempted (with some success) to fit the statute into the necessary and proper clause itself: because the judges authorized by the federal law to determine ownership claims exercised judicial power, the entire legislation implemented the federal question jurisdiction conferred by article III.[44] Coupled with long acquiescence in the construction given the clause by Congress as early as 1793,[45] these arguments made it relatively easy to sustain congressional authority. It is interesting, nonetheless, to see a states'-righter like Daniel, under the influence of the slavery question, swallow such a heavy dose of implied federal power.[46]

The constitutionality of the federal statute, however, did not prove that it precluded state legislation. In light of what Professors Hart and Wechsler perceptively called the "interstitial" nature of federal law,[47] it seems at least as likely that Congress meant to leave unregulated matters to the states as that it meant to leave them unregulated entirely. Story made no effort to show any actual inconsistency between the state and federal provisions. As McLean insisted, both required official approval of a claim of ownership before a slave could be taken away; the federal law did not authorize the self-help that Pennsylvania had attempted to punish.[48] Despite its reputation as a defender of state inter-

41. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 411-21 (1819); *see* Currie, *States and Congress, 1801-1835*, *supra* note 2, at 927-38.

42. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1820); *see* Currie, *States and Congress, 1801-1835*, *supra* note 2, at 958-60.

43. *Prigg*, 41 U.S. (16 Pet.) at 615-16.

44. *Id.* at 616.

45. *Id.* at 620-21.

46. *Id.* at 651-52 ("These [powers] are not properly concurrent, but may be denominated dormant powers in the federal government; they may at any time be awakened into efficient action by Congress, and from that time so far as they are called into activity, will of course displace the powers of the states.").

47. H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 470-71 (2d ed. 1973) ("Congress acts . . . against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.").

48. *Prigg*, 41 U.S. (16 Pet.) at 667-72. Although the federal law arguably required only ex parte proof of ownership, Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302, 303-04 ("upon proof to the satisfaction of such judge or magistrate, either by oral testimony or affidavit"), Pennsylvania required a trial, Act of Mar. 25, 1826, ch. 50, § 6, 1826 Pa. Laws 150, 152-53; but Prigg was hardly in a position to complain since he also did not have a federal certificate.

ests, the Taney Court had once again followed Marshall in reading more preemptive effect into federal statutes than Congress appeared to have put there.[49]

Similarly, that Congress could legislate on the subject of fugitive slaves by no means compelled the conclusion that the states could not. Taney, Thompson, and Daniel all deserted Story on this issue.[50] Taney persuasively argued that the apparent requirement that states deliver fugitives implied state implementing legislation;[51] Daniel properly observed that the Court had already held that the explicit bankruptcy power was not exclusive.[52] Story neither responded to the bankruptcy analogy, nor came up with counterexamples of his own,[53] nor gave any convincing reason why uniformity was so important in the fugitive slave field that it overcame the natural inference that when the Framers meant to forbid state action they said so.[54]

It seems perplexing that the anti-slavery Story went so far out of his way to strike down a law protecting free persons from being taken into slavery. His explanation that personal preferences must yield to the Constitution[55] seems weak, because the Constitution did not seem to contradict Story's own convictions. Part of the answer may be that,

49. *Compare, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (federal coasting license bars state steamboat monopoly), *and* Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827) (tariff act bars state taxation of seller of imported goods), *with* The Passenger Cases, 48 U.S. (7 How.) 282 (1849) (tariff act bars taxation of incoming passengers), *and* Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1852) (steamboat license and compact for free navigation preclude state bridge).

50. *See Prigg*, 41 U.S. (16 Pet.) at 626 (opinion of Taney, C.J.); *id.* at 633 (opinion of Thompson, J.); *id.* at 650 (opinion of Daniel, J.).

51. *Id.* at 628.

52. *Id.* at 653-54 (citing Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819)). *See generally* Currie, *States and Congress, 1801-1835*, *supra* note 2, at 910-16. Daniel also invoked Thompson's argument in New York v. Miln, 36 U.S. (11 Pet.) 102 (1837), that the commerce power was not exclusive. *See* Currie, *Contracts and Commerce, 1836-1864*, *supra* note 1, at 474-77.

53. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 26 (1825) (dictum) (denying state power to regulate federal court procedure); Chirac v. Lessee of Chirac, 15 U.S. (2 Wheat.) 259, 269 (1817) (suggesting that only Congress could regulate naturalization). McLean, agreeing with Story, said the fugitive slave power was as exclusive as that over commerce. *Prigg*, 41 U.S. (16 Pet.) at 662. Because the Court had yet to hold that the commerce clause had any negative effect on state authority, this analogy fell somewhat short.

54. That the Framers could not have intended to allow the states to frustrate the Constitution's purposes was a principle familiar since McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Nevertheless, as in *McCulloch* itself, *see* Currie, *States and Congress, 1801-1835*, *supra* note 2, at 927-38, no implied limitation on state authority was necessary in *Prigg* in order to secure the national goal. Just as Congress could have immunized the national bank from state taxation, it could have outlawed state legislation that interfered with the recovery of runaways. Indeed, an alternative basis for *Prigg* itself was that Congress had already done so. *See Prigg*, 41 U.S. (16 Pet.) at 617-18.

55. *See* G. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 401 (1970).

as Daniel perceived, the exclusivity of federal power was a sword with two edges: in striking down a law protecting free blacks, Story established that the states could not help enforce the fugitive slave clause.[56] This does not explain Story's additional argument that the kidnapping law unconstitutionally discharged a fugitive slave, but the legal realist might surmise that it was the price of majority support for his exclusivity conclusion.[57]

C. *Other Fugitives.*

Article IV also contains a clause dealing with another kind of fugitive: any "person charged in any State with Treason, Felony, or other Crime" found in another state must "be delivered up" to the state in which he is so charged "on Demand."[58] In the same 1793 statute that specified the procedure for return of runaway slaves, Congress also implemented this extradition clause, making it "the duty of the executive authority" of the state to which the accused had fled to arrest and return him.[59] In 1861, however, when Kentucky sued to require Ohio's governor to deliver up a fugitive from justice in *Kentucky v. Dennison*,[60] the Court held the Governor's duty unenforceable.

Taney wrote for a unanimous Court, and he left no doubt that Ohio was in the wrong. Ohio's position that helping a slave to escape was not a "Crime" within article IV because not all states made that act criminal, Taney sensibly observed, would engender just the sort of

56. *Prigg*, 41 U.S. (16 Pet.) at 656-57. Daniel's fellow southerner Wayne held a different view, arguing that state "assistance" was likely to sabotage the constitutional goal, as in the case before him. *Id.* at 643-44. Daniel's prognosis, however, seems to have been correct. *See* C. SWISHER, ROGER B. TANEY 424 (1936) ("The major significance of the decision lies in the fact that many of the northern states took advantage of the advice that they might forbid their officers to aid in the enforcement of the federal Fugitive Slave Law, thereby rendering it ineffective."); *see also* 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 87 n.1 (rev. ed. 1928) (adding that Story's son said the Justice had referred to the decision as " 'a triumph of freedom' "). As noted by Fehrenbacher, this "triumph" was overturned when Congress passed a new and more effective fugitive slave provision in 1850. D. FEHRENBACHER, *supra* note 39, at 43.

57. In Moore v. Illinois, 55 U.S. (14 How.) 13 (1852), the Court, in an opinion by Grier, upheld an Illinois conviction for secreting a fugitive slave, distinguishing *Prigg* on the basis of Story's peculiar concession in *Prigg* that exclusivity did not preclude the state from exercising its police power to rid itself of undesirable persons and emphasizing rather debatably that the Illinois law neither hindered nor assisted the master in recovering his slave. *Prigg*, 41 U.S. (16 Pet.) at 625. Grier also implied, however, that what Story had tried to settle in *Prigg* actually remained unsettled: "we would not wish it to be inferred, by any implication from what we have said, that any legislation of a State to aid and assist the claimant, and which does not directly nor indirectly delay, impede, or frustrate the reclamation of a fugitive, . . . is necessarily void." *Moore*, 55 U.S. (14 How.) at 19.

58. U.S. CONST. art. IV, § 2, cl. 2.

59. Act of Feb. 12, 1793, ch. 7, § 1, 1 Stat. 302, 302.

60. 65 U.S. (24 How.) 66 (1860). *See generally* 5 C. SWISHER, *supra* note 4, at 685-90.

"controversy" the extradition clause was meant to prevent and would render it "useless for any practical purpose";[61] the broad term "other Crime," contrasted with the restrictive "high misdemeanor" in the Articles of Confederation,[62] extended the obligation to "every offence made punishable by the law of the State in which it was committed."[63] Although the clause did not say so, that obligation clearly lay on the governor of the state where the fugitive was found because similar words had been used in the Articles before there were any federal authorities who could have taken action.[64] Finally, as with the fugitive slave clause in *Prigg*, Congress had implied power to adopt regulations to implement this prescription.[65]

Having said all this, Taney executed a sudden *volte-face*:

> [L]ooking to the subject-matter of this law, and the relations which the United States and the several States bear to each other, the court is of opinion, the words "it shall be the duty" [in the 1793 Act] were not used as mandatory and compulsory, but as declaratory of the moral duty which [article IV created]. . . . [T]he Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State . . . .[66]

This was the first time the Court had based a decision on the implicit immunity of states from federal legislation,[67] and it seemed to contradict Marshall's comment in upholding a converse federal immunity in

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61. *Dennison*, 65 U.S. (24 How.) at 102.

62. ARTICLES OF CONFEDERATION art. 4, § 2.

63. *Dennison*, 65 U.S. (24 How.) at 103. The words "Treason" and "Felony," he added, had been included to show that political offenses were extraditable. *Id.* at 99-100. In support of Taney's construction, see Notes of James Madison (Aug. 28, 1787), *reprinted in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 437, 443 (M. Farrand ed. 1966) [hereinafter cited as 2 CONVENTION RECORDS] (the present language was substituted for the phrasing taken from the Articles "in order to comprehend all proper cases: it being doubtful whether 'high misdemeanor' had not a technical meaning too limited"). *See also* C. PINCKNEY, *supra* note 14, *reprinted in* 3 CONVENTION RECORDS, *supra* note 14, at 112.

64. *Dennison*, 65 U.S. (24 How.) at 102-03.

65. *Id.* at 104; *cf. supra* text accompanying notes 31-46 (discussing *Prigg*).

66. *Dennison*, 65 U.S. (24 How.) at 107-08.

67. Suggestive but distinguishable dicta had appeared in *Prigg*. *See Prigg*, 41 U.S. (16 Pet.) at 616 ("it might well be deemed an unconstitutional exercise of the power of interpretation to insist that the States are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the Constitution"). McLean disputed this observation at the time, using the extradition clause as a counterexample. *See id.* at 664-65. Taney, however, cited neither *Prigg* nor anything else in this part of his *Dennison* opinion, and McLean silently went along with Taney.

McCulloch v. Maryland[68] that the states needed no immunity because they had a political check through their representation in Congress. Taney could have pointed out that by conferring only limited federal powers the Framers had shown they considered the political check inadequate and that, unlike Congress, the states could not protect themselves by legislation. He might then have turned *McCulloch*'s actual holding to his advantage by arguing that the Court had already recognized implicit immunities needed to keep one government from destroying another.[69]

In *Dennison* itself, however, the inability of Congress to impose duties on state officials seems irrelevant,[70] for Taney had earlier confirmed that the *Constitution* required them to deliver fugitives to other states.[71] Reducing this plain limitation to a "moral duty" out of concern for state autonomy would essentially allow the governor to decide which offenses were extraditable, and, as Taney had said earlier in his opinion, that would read the extradition clause right out of the Constitution.[72]

Some twenty years before, in *Holmes v. Jennison*,[73] the Taney Court had faced the related question whether a state could constitutionally deliver up a fugitive from a foreign country and had been unable to decide it. A man charged with murder in Quebec had been arrested in Vermont for purposes of extradition, and the Supreme

68. 17 U.S. (4 Wheat.) 316, 398 (1819); *see* Currie, *States and Congress, 1801-1835*, *supra* note 2, at 927-38.

69. One recent application of this general principle, despite the novelty of its particular result, appears in National League of Cities v. Usery, 426 U.S. 833 (1976). The argument for state autonomy seems especially potent when Congress seeks not to limit state activities but to require state enforcement of federal law. *See* D. CURRIE, AIR POLLUTION: FEDERAL LAW AND ANALYSIS § 4.29 (1981).

70. Taney distinguished the practice of state courts in entertaining federal claims as entirely voluntary. *Dennison*, 65 U.S. (24 How.) at 108-09. Later cases that hold Congress may require state courts to do so, *e.g.*, Testa v. Katt, 330 U.S. 386 (1947), seem questionable after *National League of Cities* but may be distinguishable on the ground that the Constitution itself (in the supremacy clause) requires state judges to apply federal law. This distinction could support *Dennison*'s extradition statute as well: it, too, implements a constitutional duty. *See Prigg*, 41 U.S. (16 Pet.) at 664-66 (opinion of McLean, J.).

71. *Dennison*, 65 U.S. (24 How.) at 103-04.

72. *See* 3 J. STORY, *supra* note 14, § 1800, at 676 (the extradition clause gave "strength to a great moral duty . . . by elevating the policy of the mutual suppression of crimes into a legal obligation"); *see also* 5 C. SWISHER, *supra* note 4, at 690 (comparing *Dennison* to Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)) (Taney delivered a lecture to refractory northern governors "but refrained from applying . . . a coercive power which the federal government did not possess"; another interpretation might be that the Court was lying low after the debacle of its activism in Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). *See generally infra* text accompanying notes 200-75).

73. 39 U.S. (14 Pet.) 540 (1840).

Court was asked to release him.[74] Taney's well-crafted opinion made a strong case for the initially surprising conclusion that extradition constituted an "Agreement or Compact with . . . a foreign Power," which, under article I, section 10, a state could not make without congressional consent.[75] As Taney read it, the consent requirement was intended to prevent the states from meddling with foreign affairs to the possible detriment of national policy, and the states could not evade it simply by neglecting to reduce an agreement to writing.[76] He unnecessarily went on to say that Vermont's action intruded on the implicitly exclusive power given the federal government with respect to foreign affairs.[77]

This latter conclusion contrasts strikingly with Taney's firm position that the states could regulate commerce[78] and with his argument in *Prigg* that they could enforce the fugitive slave clause.[79] Distinguishing Barbour's counterexample of the bankruptcy clause[80] by finding an overriding need for uniformity, Taney argued that the Constitution was designed "to make us, so far as regarded our foreign relations, one people, and one nation; and to cut off all communications between foreign governments, and the state authorities," and that conflicting state policies about extradition could cause problems for the whole country.[81] Finally, Taney noted that the treaty power could never be "dormant" in the same sense as ordinary legislative powers.[82] Rather, by declining to enter into extradition treaties for a number of years the United States had expressed a policy against extradition. A state could no more defy that policy than it could appoint an ambassador to a nation the President had declined to recognize.[83]

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74. *Id.* at 563-64.

75. U.S. CONST. art. I, § 10, cl. 3.

76. *Holmes*, 39 U.S. (14 Pet.) at 572-74. For the contrary argument, see the concurring opinion of Judge Redfield on remand. *Ex parte* Holmes, 12 Vt. 631, 646 (1840) ("A plain unsophisticated mind would find it difficult to construe that a '*compact or agreement*,' which was confessedly mere *comity*, and of course might be done or omitted at pleasure.") (emphasis added). In the course of this discussion Taney made some useful comments on the difficult and important question of distinguishing compacts from treaties, which the states may not make even with congressional permission. *See Holmes*, 39 U.S. (14 Pet.) at 571-72; *see also* U.S. CONST. art. I, § 10. No meaningful comments on the compact clause appear in the Convention debates or in *The Federalist*.

77. *Holmes*, 39 U.S. (14 Pet.) at 576-79.

78. *See* Currie, *Contracts and Commerce, 1836-1864*, *supra* note 1, at 500-01 (discussing The License Cases, 46 U.S. (5 How.) 504 (1847)).

79. *See supra* text accompanying notes 50-51.

80. *Holmes*, 39 U.S. (14 Pet.) at 591-92 (opinion of Barbour, J.); *cf.* Currie, *States and Congress, 1801-1835*, *supra* note 2, at 910-16 (discussing Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819)).

81. *Holmes*, 39 U.S. (14 Pet.) at 575-76.

82. *Id.* at 576-78.

83. *Id.* at 574, 577.

That the treaty power allows the President to make binding policy by inaction may seem questionable, but Taney put the arguments for exclusive federal power strongly, showing once again that he was no doctrinaire states'-righter.[84] He was joined, however, only by Story, McLean, and Wayne,[85] the most federal-minded of his brethren. McKinley missed this Term altogether,[86] and the other four Justices, for various reasons, thought there was no jurisdiction.[87] There was no decision on the merits; Catron, however, made it clear he would have joined Taney if there had been proof that Vermont had arrested Holmes in response to a request from Quebec.[88] Thus, a majority of the Democratic Court took a broad view in *Holmes* of both explicit and implicit limits on state power,[89] as it would do again two years later in *Prigg v. Pennsylvania*.[90]

D. *Federal Immunities.*

In *Kentucky v. Dennison*[91] the Taney Court employed an implicit constitutional immunity to minimize federal interference with the states. The Court was equally sensitive, though, to the protection of federal activities from state action. In two widely separated decisions, for example, it unanimously held the Constitution forbade state taxa-

84. As in *Prigg*, however, Congress could perhaps have protected the federal interest without exclusivity by passing a law forbidding state extradition, though it is not immediately obvious to which express federal authority such a law would have been "necessary and proper."

85. *See Holmes*, 39 U.S. (14 Pet.) at 561.

86. *See* 39 U.S. (14 Pet.) at vii.

87. *See Holmes*, 39 U.S. (14 Pet.) at 579-86 (Thompson, J., combining arguments that no constitutional provision was actually offended with the contention that none was properly invoked below); *id.* at 586-94 (Barbour, J., finding no jurisdiction because there was no agreement and federal power was not exclusive); *id.* at 594-98 (Catron, J., finding no jurisdiction because no agreement had been proved). Once again, the third edition of the reports brought with it another windy opinion by Baldwin. *See* 39 U.S. (14 Pet.) at 586-86x (3d ed. 1884) (finding no jurisdiction because a state habeas corpus judgment was neither civil nor final as allegedly required for Supreme Court review—a position that seemed to contradict Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821)). For discussion of other belated, rambling opinions by Baldwin, see Currie, *Contracts and Commerce, 1836-1864*, *supra* note 1, at 475 n.25, 479 n.47, 482 n.73.

88. *Holmes*, 39 U.S. (14 Pet.) at 595-96. The Vermont court, with a more complete record, took this to mean Holmes had to be released. *See Ex parte* Holmes, 12 Vt. 631, 633 (1840) (noting that Quebec had asked for extradition and that the Governor had apprised Quebec "that the surrender would be made agreeably to the order").

89. *See* 2 C. WARREN, *supra* note 56, at 64-66 (declaring that Taney's "superbly able opinion" had "sustained the supremacy of the powers of the Federal Government, with a breadth and completeness . . . excelled by no one of Marshall's opinions" and reporting James Buchanan's accusation that portions of the opinion were " 'latitudinous and centralizing beyond anything I have ever read in any other judicial opinion' ").

90. *See supra* notes 31-46 and accompanying text.

91. 65 U.S. (24 How.) 66 (1861).

tion either of a federal officer in proportion to the value of his office[92] or of federal securities owned by a banking corporation.[93] These decisions extended federal immunity beyond the Marshall precedents they relied on: the taxes in both *McCulloch v. Maryland*[94] and *Weston v. City Council*[95] had been more or less discriminatory.[96] In the federal securities case, however, Nelson pointed out that neither *McCulloch* nor *Weston* relied on the discriminatory nature of the tax, and he repeated *McCulloch*'s unconvincing argument that a court could not be expected to administer a ban that was less than absolute.[97]

The famous 1859 decision in *Ableman v. Booth*,[98] however, provided the most striking instance of the protection afforded federal activities by the Supreme Court during Taney's tenure. A federal commissioner jailed Booth on charges of aiding the escape of a fugitive slave. The Wisconsin courts freed him on habeas corpus, holding unconstitutional the new Fugitive Slave Act that formed part of the Compromise of 1850, and ordered him released again on the same ground after he had been convicted in federal court.[99] The Court unanimously reversed, holding the state courts could not investigate the validity of a federal order of commitment.[100]

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92. Dobbins v. Commissioners of Erie County, 41 U.S. (16 Pet.) 435 (1842).

93. New York *ex rel.* Bank of Commerce v. Commissioners of Taxes, 67 U.S. (2 Black) 620 (1863).

94. 17 U.S. (4 Wheat.) 316 (1819).

95. 27 U.S. (2 Pet.) 449 (1829).

96. *See* T. POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 92-93 (1956); Currie, *States and Congress, 1801-1835*, *supra* note 2, at 927-38 (discussing *McCulloch*). Moreover, in both the federal officeholder and the federal securities cases the Court was resolving an unnecessary constitutional issue. In the former it admitted that the tax also effectively contradicted the statute fixing the federal officer's compensation, Dobbins v. Commissioners of Erie County, 41 U.S. (16 Pet.) 435, 449-50 (1842), and in the latter it simply ignored an act of Congress expressly exempting " 'all stocks, bonds, and other securities of the United States' " from state taxation, New York *ex rel.* Bank of Commerce v. Commissioners of Taxes, 67 U.S. (2 Black) 620, 625 (1863).

97. New York *ex rel.* Bank of Commerce v. Commissioners of Taxes, 67 U.S. (2 Black) 620, 629-34 (1863). The Court has since overruled *Dobbins*, holding that taxation of the income of federal employees had too speculative and uncertain an impact on the government to sustain the conclusion that it was implicitly prohibited. Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939) (incorporating arguments made in the converse case of Helvering v. Gerhardt, 304 U.S. 405 (1938)).

98. 62 U.S. (21 How.) 506 (1859). *See generally* 5 C. SWISHER, *supra* note 4, at 653-75; 2 C. WARREN, *supra* note 56, at 258-66, 332-44; Beitzinger, *Federal Law Enforcement and the Booth Cases*, 41 MARQ. L. REV. 7 (1957).

99. *Ableman*, 62 U.S. (21 How.) at 507-08.

100. *See* Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 353 (1930) (noting that although state habeas for federal prisoners was "entirely incompatible with the constitutional relations of the Federal and State Governments," it had been practiced "for a period of eighty years"; Taney did not allude to this practice).

Because the state supreme court refused to respond to the writ of error, Taney devoted much of his opinion to a restatement, in best Marshall fashion, of the necessity and propriety of Supreme Court review of state court decisions[101]—citing, however, neither *Martin v. Hunter's Lessee*[102] nor *Cohens v. Virginia*,[103] which were squarely on point.[104] He also cited nothing in support of his more interesting conclusion that the state could not discharge a federal prisoner. The opinion rests largely upon bold fiat:

> [N]o State can authorize one of its judges or courts to exercise judicial power . . . within the jurisdiction of another and independent Government. . . . Wisconsin had no more power to authorize these proceedings . . . than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offence against the laws of the State in which he was imprisoned.[105]

Taney accompanied this conclusion with an in terrorem observation:

> If the judicial power exercised in this instance has been reserved to the States, no offence against the laws of the United States can be punished by their own courts, without the permission and according to the judgment of the courts of the State in which the party happens to be imprisoned . . . .[106]

Elsewhere in the opinion Taney quoted the supremacy clause, apparently to establish that the United States could "execute its own laws by its own tribunals, without interruption from a State,"[107] and in summing up the Wisconsin proceedings he said the state court had "supervise[d] and annul[led] the proceedings of a commissioner of the United States," as well as a federal judgment.[108]

This sketchy reasoning hints at several possible arguments. The supremacy clause alone[109] lends little support; it binds state courts to follow the Constitution, not to respect unconstitutional exercises of federal authority.[110] The analogy to a Michigan prisoner was also not very helpful. If anything in the Constitution at the time forbade Wis-

101. *Ableman*, 62 U.S. (21 How.) at 517-23.

102. 14 U.S. (1 Wheat.) 304 (1816).

103. 19 U.S. (6 Wheat.) 264 (1821).

104. *See* Currie, *Federal Courts, 1801-1835*, *supra* note 2, at 681-94.

105. *Ableman*, 62 U.S. (21 How.) at 515-16.

106. *Id.* at 514.

107. *Id.* at 517.

108. *Id.* at 513-14.

109. U.S. CONST. art. VI, cl. 2.

110. *See* Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385, 1402 (1964).

consin to meddle with other states' prisoners it was the full faith and credit clause,[111] which says nothing about the federal government.

Two passages in *Ableman* hinted at more promising arguments, but neither was adequately developed. First, the suggestion that state courts were required to respect federal judgments could have been supported by an argument that in giving federal courts criminal jurisdiction Congress must have intended to empower them to dispose effectively of the case. Even this was not conclusive, because the jurisdiction of a court was traditionally subject to collateral investigation,[112] and because the Supreme Court was soon to hold that the constitutionality of the statute defining an offense was "jurisdictional" in this sense.[113] Moreover, it was less clear that the finality argument applied to the commissioner's pretrial order, which may not have been a judicial judgment but which apparently was held equally immune from state examination.[114] Most importantly, Taney neglected to develop fully the statutory basis for this argument.

Second, the in terrorem passage seems to borrow a page from *McCulloch v. Maryland*,[115] where Marshall argued, in holding that states could not tax the national bank, that the Framers were too sensible to have allowed the states to frustrate the exercise of federal authority. As in *McCulloch*, Congress's power under the necessary and proper clause seemed fully adequate to protect federal interests without resort to an implied immunity;[116] but since this point had not troubled the Court in *McCulloch*, that case was a good starting point for analysis of *Ableman*. Nevertheless it did not necessarily follow that because a state could not tax federal operations it could not decide whether a federal imprisonment was legal. To tax federal activities necessarily burdens them; in

111. *But cf.* Nevada v. Hall, 440 U.S. 410 (1979) (full faith and credit clause does not require one state to respect another's sovereign immunity from suit). The due process clause of the fourteenth amendment now limits the geographical reach of state court jurisdiction. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). The fourteenth amendment was adopted after *Ableman*, however, and there was no doubt that Booth was within the geographical reach of Wisconsin process.

112. *See, e.g., Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830); *In re* Booth, 3 Wis. 157, 178-212 (1855).

113. *See Ex parte* Siebold, 100 U.S. 371 (1880).

114. *See also* Tarble's Case, 80 U.S. (13 Wall.) 397 (1872) (reaffirming *Ableman* in the absence of any federal judgment).

115. 17 U.S. (4 Wheat.) 316, 362 (1819); *see* Currie, *States and Congress, 1801-1835*, *supra* note 2, at 927-38.

116. For example, Congress could have given the federal courts exclusive jurisdiction to determine the validity of a federal commitment, made federal judgments binding on state courts, or provided for removal (as it has since done, 28 U.S.C. § 1442 (1976)) of state court suits against federal officers. *See* Tennessee v. Davis, 100 U.S. 257 (1880); The Moses Taylor, 71 U.S. (4 Wall.) 411 (1867) (upholding analogous removal and exclusivity provisions); *see also* Currie, *States and Congress, 1801-1835*, *supra* note 2, at 936.

Ableman the burden arose only from the risk that the state court might make a mistake in interpreting federal law, and the Supreme Court had jurisdiction to correct such a mistake on writ of error.[117] In any event, *McCulloch* was not even cited.[118]

Thus, unlike some commentators,[119] I find *Ableman* one of Taney's least effective performances.[120] Though he had at his disposal powerfnl arguments to support his Marshall-like conclusions in favor of federal supremacy, in the worst Marshall tradition he disdained to make them.[121]

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117. *Ableman*, 62 U.S. (21 How.) at 525-26.

118. The Court did not seem to find an implicit exclusivity in the statute giving federal courts habeas jurisdiction. The Court had already established that implicit exclusivity was exceptional. *See* Houston v. Moore, 18 U.S. (15 Wheat.) 1 (1820), *discussed in* Currie, *Federal Courts, 1801-1835*, *supra* note 2, at 702-05. For example, the Court allowed state court replevin and trover actions against federal officers in Slocum v. Mayberry, 15 U.S. (2 Wheat.) 1, 12 (1817), and in Teal v. Felton, 53 U.S. (12 How.) 284 (1852). Taney might nevertheless have built on the unreasoned holding that state courts could not issue mandamus to federal officers, M'Clung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821), but he did not do so.

119. *See* 5 C. SWISHER, *supra* note 4, at 662 (*Ableman* "marked the Chief Justice at his best"); 2 C. WARREN, *supra* note 56, at 336 (calling *Ableman* "the most powerful of all his notable opinions").

120. As if that were not enough, after holding that the court below had no power to determine the issue, Taney added that it had erred on the merits: the challenged fugitive slave provisions were (for undisclosed reasons) constitutional. *Ableman*, 62 U.S. (21 How.) at 526. Apart from the contention that Congress had no power to implement the fugitive slave clause, the arguments of the judges below seemed not so frivolous as to warrant such cavalier dismissal. They had argued, for example, that the Act gave judicial duties to commissioners lacking the protections of article III, that there was a right to jury trial on the question whether the person captured was an escaped slave, and that due process required notice and opportunity to respond. *See In re* Booth, 3 Wis. 1, 36, 40-43, 64-70 (1854). For counter-arguments based on the ability of Congress to leave matters to state courts and on the preliminary nature of the deprivation (an argument rejected in analogous circumstances in *Prigg*), see *In re* Booth, 3 Wis. at 82-84 (Crawford, J., dissenting).

121. The Court also decided several cases giving a rather restrained interpretation to article IV's command that one state give full faith and credit "to the public Acts, Records, and judicial Proceedings" of another. U.S. CONST. art. IV, § 1. In Marshall's days the Court had held a sister-state judgment had to be enforced without reexamining its merits. Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813). Under Taney the Court allowed the enforcing state to apply to such a judgment a statute of limitations it would not have applied to a suit on its own judgments, M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312 (1839), to limit to sixty days the time in which to sue on such a judgment, Bacon v. Howard, 61 U.S. (20 How.) 22 (1857), and to allow the limitation period to run while the debtor was outside the state, Bank of Alabama v. Dalton, 50 U.S. (9 How.) 522 (1850). Finally, in D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1851), the Court held that one state did not have to enforce another's judgment entered without service of process on the defendant, even though the judgment would have been enforceable in the state where it was rendered.

Now that the due process clause of the fourteenth amendment renders a judgment entered without personal jurisdiction void even in the state where rendered, the *D'Arcy* rule seems obvious. In Taney's time, however, nothing in the Constitution seemed to invalidate such a judgment, and the statute implementing article IV appropriately provided that sister-state judgments be given "such faith and credit . . . as they have by law or usage in the courts of the state from whence [they are] . . . taken." Act of May 26, 1790, ch. 11, 1 Stat. 122. To read traditional bases

II. FEDERAL JURISDICTION

A. Luther v. Borden.

Sued in a federal diversity case for breaking into Luther's house, Borden defended on the ground that he had been carrying out orders of the Rhode Island government to suppress rebellion. Luther responded that the government for which Borden acted no longer was the legitimate government of Rhode Island. The circuit court, rejecting this contention, held that no trespass had been committed, and the Supreme Court, in 1849, affirmed.[122] Familiar to hordes of law students as the central fount of the political question doctrine, *Luther v. Borden* deserves closer attention lest it be taken to establish more than it actually held.[123]

Taney began his opinion for the Court by pointing to the chaotic results of holding an entire state government illegitimate:

> [T]he laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.[124]

Later in the opinion he mentioned other practical difficulties: evidentiary problems would confound the inquiry whether the new state constitution under which Luther claimed authority had received the support of a majority of eligible voters;[125] also, because the issue would

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for declining to respect a foreign judgment into a provision designed to make that respect mandatory seems highly questionable.

122. Luther v. Borden, 48 U.S. (7 How.) 1 (1849). Catron, Daniel, and, once again, McKinley "were absent on account of ill health when this case was argued." *Id. See generally* 5 C. SWISHER, *supra* note 4, at 522-27; W. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 111-29 (1972).

123. At least two other decisions of the Taney period had political question overtones. Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 421 (1839), an early salvo in a dispute that has continued to capture headlines in our own time, deferred to the President's decision that the "Buenos Ayrean" government had no authority over the Falkland Islands. Fellows v. Blacksmith, 60 U.S. (19 How.) 366, 372 (1856), refused to inquire whether those signing an Indian treaty had tribal authority to do so. The first case appears to conclude unsurprisingly that the President had acted within his authority on the merits. *Williams*, 38 U.S. (13 Pet.) at 420. *See generally* Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 611-12 (1976). The second, saying only that "the courts can no more go behind [the treaty] for the purpose of annulling its effect and operation, than they can behind an act of Congress," *Fellows*, 60 U.S. (19 How.) at 372, seems harder to square with *Marbury*'s obligation to say what the law is. Although courts typically decide questions of an agent's authority, *see generally* F. MECHEM, OUTLINES OF THE LAW OF AGENCY (2d ed. 1903), the congressional analogy is still troubling. *See also infra* notes 150, 292-93 and accompanying text.

124. *Luther*, 48 U.S. (7 How.) at 38-39.

125. *Id.* at 41-42.

depend in part on witness credibility, juries might reach conflicting results in similar cases.[126]

Such considerations have become a part of today's political question discussion,[127] but it would be stretching things to call them the basis of *Luther*. The passage warning of chaotic results was not a holding of nonjusticiability but a prelude to a note of caution: "When the decision of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction."[128] Taney did present the problems of proof and conflicting verdicts as additional reasons for declining to inquire whether the original state government had been superseded, but he did so only after he had plainly announced a more traditional and indisputable basis for his conclusion. Which faction constituted the legitimate government, Taney noted, was a question of state law.[129] The state supreme court, in holding that this inquiry "belonged to the political power and not to the judicial," had already held "that the charter government was the lawful and established government," and the circuit court was bound to "adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State."[130] The practical considerations Taney later raised were just icing on the cake; it is not at all clear they would have been taken to forbid federal resolution of the dispute had that not been contrary to state law.

The most interesting part of the *Luther* opinion, and the only part that seemed to invoke constitutional considerations, was also an afterthought following the state law decision:

> Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department. . . .
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> . . . .
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> . . . For as the United States [in article IV] guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional

126. *Id.*
127. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 269 (1962) (Frankfurter, J., dissenting).
128. *Luther*, 48 U.S. (7 How.) at 39.
129. *Id.* at 40.
130. *Id.* at 39-40.

> authority. And its decision is binding on every other department of the government . . . .[131]

Every link in this chain of bare conclusions is subject to serious counterattack. Article IV does not say Congress shall guarantee the states a republican government; it says the "United States" shall.[132] Article I nowhere declares that the House and Senate have authority to pass upon the legitimacy of a state government in seating their members.[133] Finally, the fact that Congress or one of its houses may have power to determine a question does not mean its decision binds the courts or that no other branch has power to determine the same question. Having sworn to uphold the Constitution,[134] Congress passes regularly on the extent of its legislative authority, but that does not preclude the courts from holding a statute unconstitutional.[135]

None of this proves Taney's conclusion wrong. As Gerald Gunther has argued, "there is nothing in [*Marbury v. Madison*[136]] that precludes a constitutional interpretation which gives final authority to another branch" to make a particular determination.[137] First, the Court may find that the President or Congress has broad substantive discretion, as in receiving ambassadors or declaring war;[138] *Marbury* itself seemed to speak of "political" questions in this way.[139] Second, other provisions may deprive the courts of jurisdiction to remedy even errors of constitutional dimension; the familiar example of whether an impeached officer has committed "high Crimes and Misdemeanors"[140] is supported not only by the textual argument that the grant of a judi-

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131. *Id.* at 42.

132. U.S. CONST. art. IV, § 4; *see* W. WIECEK, *supra* note 122, at 77; Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 523 (1962).

133. Powell v. McCormack, 395 U.S. 486, 550 (1969) (interpreting article I, § 5), would later hold that the "qualifications" to be judged by each house include only age, citizenship, and residence.

134. U.S. CONST. art. VI, cl. 3.

135. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 191 (1962) ("there is no textual reason [why judging member qualifications] . . . should be deemed proof against judicial intervention, any more than the language of the Commerce Clause").

136. 5 U.S. (1 Cranch) 137 (1803).

137. Gunther, *Judicial Hegemony and Legislative Autonomy: The* Nixon *Case and the Impeachment Process*, 22 U.C.L.A. L. REV. 30, 34 (1974).

138. U.S. CONST. art. II, § 3; U.S. CONST. art. I, § 8; *see* Henkin, *supra* note 123, at 608 (arguing that many "political question" decisions, including *Luther*, actually upheld the challenged action on the merits).

139. *Marbury*, 5 U.S. (1 Cranch) at 165-66; *see* Currie, *Federal Courts, 1801-1835*, *supra* note 2, at 651-52.

140. U.S. CONST. art. II, § 4; *see, e.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-8 (1959).

cial function to the Senate[141] implies an exception to article III,[142] but also by history suggesting a deliberate exclusion of the courts.[143] The weakness of Taney's opinion lay not in recognizing that such provisions might exist, but in failing to demonstrate that the guarantee clause was one of them.[144]

Superficially more persuasive was his contention that the President had recognized the charter government by passing on its request for aid in putting down the rebellion, and that the Court had already held Congress had given him unreviewable discretion in determining whether there was a sufficient danger to justify action under the clause of article IV providing for the suppression of invasions and domestic violence.[145] This precedent, however, did not compel a finding of comparable discretion to resolve the distinct question whether the government requesting aid was a legitimate one. Indeed, President Tyler had explicitly disclaimed *any* discretion in this regard when recognizing the Rhode Island authorities, considering himself bound by Congress's actions in admitting the state to the Union and in continuing to seat its senators and representatives.[146] Finally, Taney's contention that judicial second-guessing in the face of domestic violence would make the constitutional provision "a guarantee of anarchy, and not of order"[147] rested on a debatable view of the merits. Whether the requesting government met the guarantee clause's conditions was arguably irrelevant

141. U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments.").

142. *See* Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 539-40 (1966). Textually, of course, a distinction is possible between trials and appeals.

143. THE FEDERALIST NO. 65 (A. Hamilton) (arguing that the Justices of the Supreme Court had insufficient numbers, prestige, and strength to shoulder such a sensitive function). It seems less clear, however, that the courts would or should accept Senate sanctions on a convicted officer that go beyond the prescribed maximum.

144. Taney might have taken some comfort from the language of the clause, which, instead of being phrased as an enforceable limitation on the states themselves, directs affirmative federal action to "guarantee" an appropriate form of government. *See* Henkin, *supra* note 123, at 610. The clause not only contrasts with such obviously self-executing provisions as the ex post facto and contract clauses, but also contains a guarantee against invasion that judges could not really carry out; this, however, is scarcely conclusive. Neither the Convention debates, *The Federalist*, nor Story's treatise casts any light on the question.

145. *Luther*, 48 U.S. (7 How.) at 42-45 (citing U.S. CONST. art. IV, § 4 and Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827)).

146. *See* W. WIECEK, *supra* note 122, at 105.

147. *Luther*, 48 U.S. (7 How.) at 43. See the generalization of this argument in Baker v. Carr, 369 U.S. 186, 217 (1962), noting that political questions are often characterized by "an unusual need for unquestioning adherence to a political decision already made." Taney added that the President's power to recognize state governments was analogous to his power to recognize foreign ones. *Luther*, 48 U.S. (7 How.) at 44. The latter authority, however, derives from his powers (which apply only to foreign countries) to receive and appoint ambassadors. *See* United States v. Belmont, 301 U.S. 324 (1937); U.S. CONST. art. II, §§ 2, 3.

to the President's decision to use troops; the domestic violence provision was designed to restore order, leaving Congress thereafter to determine whether the existing government was "republican."[148]

In any event, the Court seemed at most to say only that the guarantee and violence clauses committed the decision of the legitimacy of a state government to the final determination of other branches;[149] the Court did not establish a general inability of the courts to decide "political" questions.[150] What is most puzzling about *Luther*, however, is why the Court thought the guarantee clause bore on the case at all. Counsel did not seem to claim that the state government offended article IV;[151] thus, rather than holding the guarantee clause unenforceable, as he is generally understood to have done, Taney must have concluded that it deprived the Court of authority to determine the legiti-

148. *See* W. WIECEK, *supra* note 122, at 104 (giving Tyler's initial argument that "the executive could not look into real or supposed defects of the existing government" but must recognize it until set aside "by legal and peaceable proceedings"). Once again the Convention debates and *The Federalist* provide no help. *Cf.* Conron, *Law, Politics, and Chief Justice Taney: A Reconsideration of the Luther v. Borden Decision*, 11 AM. J. LEGAL HIST. 377, 383-84 (1967) (by concluding that the President and Congress had a duty to determine the legitimacy of the state government, Taney was construing the clause on the merits in the same breath with which he disclaimed the power to do so). See also *Luther*, 48 U.S. (7 How.) at 45, in which Taney, upholding the declaration of martial law, added unnecessarily that "[u]nquestionably" a permanent military government would not be republican, "and it would be the duty of Congress to overthrow it." Woodbury, dissenting alone and interminably from the conclusion upholding martial law, did not appear to rely on the guarantee clause. *Id.* at 48.

149. *See* W. WIECEK, *supra* note 122, at 123-24 (despite Taney's broad language, *Luther* established only that the case itself was political, not that all guarantee clause cases were); Bonfield, *supra* note 132, at 535 (the broad statements about the guarantee clause were "dictum"; the Court held only "that Congress or the President had the sole power to determine which of two contending state governments is legitimate"); Henkin, *supra* note 123, at 608 (*Luther* held "that the actions of Congress and the President in this case were within their constitutional authority").

150. At the end of the opinion Taney noted that "[m]uch of the argument . . . turned upon political rights and political questions," on which the Court declined to express an opinion. *Luther*, 48 U.S. (7 How.) at 46-47. This seems not to mean as much as it might; counsel's argument had been filled with rhetoric about the inherent right of people to change their own government, *see id.* at 28-29 (Mr. Whipple); *id.* at 30-31 (Mr. Webster), and Taney seems to have been correctly observing that this was not a legal argument at all.

Taney could also generalize about "political" matters, however, as Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838), suggests. There he dissented alone from the assertion of jurisdiction to determine an interstate boundary dispute on the unexplained ground that the rights in question were "political" rather than "judicial." *Id.* at 752-53. He relied on a similar but inconclusive hint by Marshall in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 20 (1831). *See* Currie, *Federal Courts, 1801-1835*, *supra* note 2, at 719-22. Baldwin's response that the Court's jurisdiction replaced the states' forgone rights to negotiate treaties and to declare war, and his references to a boundary dispute provision in the Articles of Confederation, seem more convincing. *See* Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) at 721-31.

151. *See* W. WIECEK, *supra* note 122, at 90, 112, 121 (noting only extrajudicial contentions that the Rhode Island government was less than "republican" and observing that the Court held the clause "took the matter out of the hands of all federal courts"); Henkin, *supra* note 123, at 608 n.33 (flatly denying that any such claim was made).

macy of the government under state law. Thus the clause appears to have played no necessary part in the decision; it was a gratuitous alternative ground of constitutional dimension and portentous significance that might better have been left out altogether.

B. *Admiralty Jurisdiction.*

In 1825, in *The Steam-Boat Thomas Jefferson*,[152] Story, the determined nationalist, held for a unanimous Marshall Court that a suit for wages earned on a Missouri River voyage lay beyond federal admiralty jurisdiction because that jurisdiction was historically confined to "waters within the ebb and flow of the tide."[153] In 1852, in *The Propeller Genesee Chief v. Fitzhugh*,[154] a nearly unanimous Court, in an opinion written by the supposedly less nationalistic Taney, held that admiralty jurisdiction embraced a suit arising out of a collision on Lake Ontario, where the tide was imperceptible.[155]

Picking up an obiter cue dropped by Story in the earlier case,[156] Congress had passed a statute purporting to extend the jurisdiction of the district courts to certain cases involving vessels on the Great Lakes and their connecting waters.[157] Loyal to uncited precedent and the spirit of article III, however, Taney rejected Story's suggestion that the commerce clause allowed Congress to give the courts cognizance of cases outside the judicial power defined by article III,[158] for

> it would be inconsistent with the plain and ordinary meaning of words, to call a law defining the jurisdiction of certain courts of the United States a regulation of commerce. . . .

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152. 23 U.S. (10 Wheat.) 428 (1825).

153. *Id.* at 429; *see* Currie, *Federal Courts, 1801-1835*, *supra* note 2, at 709-13. After Taney's appointment the Court unanimously confirmed this limitation in The Steam-Boat Orleans v. Phoebus, 36 U.S. (11 Pet.) 175 (1837) (Story, J.).

154. 53 U.S. (12 How.) 443 (1852).

155. Only Daniel, *id.* at 463-65, who had dissented on historical grounds even from the assertion of jurisdiction over tidewaters within the states, *see* Waring v. Clarke, 46 U.S. (5 How.) 441, 503 (1847), disagreed. Woodbury and Grier had also dissented in *Waring*, but the former died before *The Genesee Chief*, and the latter had apparently been converted. *See generally* 5 C. SWISHER, *supra* note 4, at 442-47.

156. *The Thomas Jefferson*, 23 U.S. (10 Wheat.) at 430.

157. Act of Feb. 26, 1845, ch. 20, 5 Stat. 726.

158. *See also* THE FEDERALIST No. 80, at 539, No. 81, at 552 (A. Hamilton) (J. Cooke ed. 1961) (quoting the enumeration in article III as "the entire mass of the judicial authority of the union" and saying that federal judicial power had "been carefully restricted to those causes which are manifestly proper for the cognizance of the national judicature"); Currie, *Supreme Court, 1789-1801*, *supra* note 2, at 851-52; *cf.* Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 14 (1800) (dismissing a suit by an alien because the opposing party was not alleged to be a citizen of any state: the statute "must receive a construction, consistent with the constitution," and "the legislative power of conferring jurisdiction on the federal Courts, is, in this respect, confined to suits *between citizens and foreigners*") (emphasis in original).

> . . . The extent of the judicial power is carefully defined and limited, and Congress cannot enlarge it to suit even the wants of commerce . . . .[159]

Given this holding, the Court could sustain the Great Lakes Act only if the case was maritime, and *The Thomas Jefferson* seemed to say it was not.

Disdaining to argue that the earlier case had interpreted the original statutory admiralty provision more narrowly than the constitutional provision it mirrored,[160] Taney held Story's decision squarely against him on the constitutional issue and candidly overruled it. If the Court laid down "any rule by which the right of property should be determined," he conceded, the principle of stare decisis "should always be adhered to"; for "it is in the power of the legislature to amend [the rule] . . . without impairing rights acquired under it."[161] No such consideration required adherence to an erroneous jurisdictional decision, however, because the "rights of property and of parties will be the same by whatever court the law is administered"[162]—especially because, as his earlier statement implied, no other remedy existed short of constitutional amendment. This was, at the time, the Court's most comprehensive treatment of stare decisis in constitutional cases. It seems also to have been only the second time the Court had overruled a constitutional decision.[163]

Taney's reasons for rejecting Story's tidal limitation were clear and convincing. The lakes "are in truth inland seas. Different States border on them on one side, and a foreign nation on the other."[164] They were used for interstate and foreign commerce and had been the scene of naval battles and prize captures. "[T]here is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction."[165] Whether or not Taney was right that the

159. *The Genesee Chief*, 53 U.S. (12 How.) at 452; *see also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1826) (Marshall, C.J.) ("to regulate . . . is, to prescribe the rule by which commerce is to be governed").

160. For an example of such a disparity between statutory and constitutional provisions, see Currie, *Federal Courts, 1801-1835*, *supra* note 2, at 671-73 (discussing Hepburn v. Ellzey, 6 U.S. (2 Cranch) 445 (1805)).

161. *The Genesee Chief*, 53 U.S. (12 How.) at 458.

162. *Id.* at 459. In this he overstated his case, because it had long been settled that federal maritime law governed admiralty cases. *See* Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158. The diversity of state laws had been given as a reason for extending admiralty jurisdiction in 1845. *See* 5 C. SWISHER, *supra* note 4, at 434.

163. The first instance is discussed *infra* at text accompanying notes 172-84. For earlier discussions of stare decisis, see generally Currie, *Federal Courts, 1801-1835*, *supra* note 2, at 670, 679-80; Currie, *States and Congress, 1801-1835*, *supra* note 2, at 972-73.

164. *The Genesee Chief*, 53 U.S. (12 How.) at 453.

165. *Id.* at 454.

reason the English jurisdiction extended only to tidewaters was that "there was no navigable stream in the country beyond the ebb and flow of the tide," he was on solid ground in arguing that "there can be no reason for admiralty power over a public tide-water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade."[166] There was no reason to think the flexible terms "admiralty" and "maritime" in the Constitution meant to petrify precedents unsuited to American conditions.[167]

This was Taney at his best, reasoning powerfully from the purposes of article III as Marshall had done in upholding diversity jurisdiction in *Bank of United States v. Deveaux*,[168] and as Story had done with respect to federal question jurisdiction in *Martin v. Hunter's Lessee*.[169] Ideally he might have stated those purposes explicitly;[170] but the implications were clear enough. Thus I find *The Genesee Chief* one of the most satisfying of all early constitutional opinions, and it certainly does not reveal either Taney or his brethren as particularly grudging in their interpretation of federal power.[171]

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166. *Id.* at 454, 457.

167. The Court had already rejected the argument that English precedents were determinative in Waring v. Clarke, 46 U.S. (5 How.) 441, 457-59 (1847) (Wayne, J.), and in New Jersey Steam Nav. Co. v. Merchants' Bank, 47 U.S. (6 How.) 344, 386-92 (1848) (Nelson, J.); in both cases the Court cited earlier decisions for more than they had said. *See* Currie, *Supreme Court, 1789-1801*, *supra* note 2, at 843-45. This conclusion was not without its problems. Extension of admiralty jurisdiction beyond English precedents not only enlarged federal judicial authority and the scope of federal maritime law; it also threatened a restriction of jury trial, because admiralty cases were typically tried by the judge alone. The Court had said in Marshall's day that the term "suits at common law" in the seventh amendment jury trial provision excluded equity and admiralty cases. *See* Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830) (dictum), *discussed in* Currie, *Federal Courts, 1801-1835*, *supra* note 2, at 706-07. Despite a general practice of referring to eighteenth-century English precedents to determine the scope of the seventh amendment, *see, e.g.*, Baltimore & C. Line v. Redman, 295 U.S. 654, 659 n.5 (1935), the Court allowed the definition of "common law" cases for jury trial purposes to ebb and flow with the tide of admiralty jurisdiction under article III. *See, e.g.*, Waring v. Clarke, 46 U.S. (5 How.) at 470 (Woodbury, J., dissenting).

Because the Great Lakes Act did provide for jury trial, *The Genesee Chief* presented the converse question whether Congress could authorize jury trial in a case *not* "at common law"; Taney rightly held it could. *See The Genesee Chief*, 53 U.S. (12 How.) at 459-602; U.S. CONST. amend. VII. The seventh amendment gives the right to a jury in certain cases, but it does not guarantee the right to a nonjury trial in others.

168. 9 U.S. (5 Cranch) 61 (1809); *see* Currie, *Federal Courts, 1801-1835*, *supra* note 2, at 675-79.

169. 14 U.S. (1 Wheat.) 304 (1816); *see* Currie, *Federal Courts, 1801-1835*, *supra* note 2, at 681-87.

170. *Cf.* THE FEDERALIST No. 80, at 538 (A. Hamilton) (J. Cooke ed. 1961) (maritime cases so depend on the "laws of nations," and so commonly affect the "rights of foreigners," that they relate to the "public peace"); Southern Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917) (Constitution aimed for "uniformity" in maritime law).

171. In the same term, on the authority of *The Genesee Chief*, the Court upheld admiralty jurisdiction of a case arising above tidewater on the Mississippi River. *See* Fretz v. Bull, 53 U.S.

C. *Diversity Cases and Other Problems.*

In diversity cases, as in admiralty, the Taney Court defined federal jurisdiction more broadly than had its nationalist forebears. In *Deveaux*, while upholding jurisdiction of an action by a corporation whose members were all alleged to be diverse to the defendant, Marshall stated without explanation (and held in a companion case) that the corporation was not itself a "citizen" for diversity purposes.[172] Combined with Marshall's equally unexplained holding in *Strawbridge v. Curtis*[173] that diversity jurisdiction lay only if all plaintiffs with joint interests were diverse to all defendants,[174] this rule excluded corporate litigation from the federal courts if any "member" of the corporation was a co-citizen of the opposite party. Just as the growth of internal commerce made the tidewater limitation on admiralty jurisdiction archaic, the rise of the corporation did the same for the restrictive part of *Deveaux*.[175] In the 1844 case of *Louisville, Cincinnati, and Charleston Rail-road v. Letson*,[176] decided even before *The Genesee Chief*, the Court (without recorded dissent)[177] cut itself loose from *Deveaux* and ostensibly from *Strawbridge* as well, proclaiming that "[w]e do not think either of them maintainable upon the true principles of interpretation of the Constitution and the laws of the United States."[178]

(12 How.) 466, 468 (1852) (Wayne, J.). Six years later, in a full-dress opinion, it applied the holding to the Alabama River, which was concededly outside the scope of the Great Lakes Act and entirely within a single state. *See* Jackson v. The Steamboat Magnolia, 61 U.S. (20 How.) 296 (1858) (Grier, J.). Daniel dissented in both cases, and in the latter was joined by Campbell and Catron. *See Fretz*, 53 U.S. (12 How.) at 472 (Daniel, J., dissenting); *Jackson*, 61 U.S. (20 How.) at 303 (Catron, J., dissenting), 307 (Daniel, J., dissenting), 322 (Campbell, J., dissenting); *see also* People's Ferry Co. v. Beers, 61 U.S. (20 How.) 393, 402 (1857) (Catron, J.) (unanimously holding a shipbuilding contract nonmaritime: "it was a contract made on land, to be performed on land"; the "wages of the shipwrights had no reference to a voyage"); New Jersey Steam Nav. Co. v. Merchants' Bank, 47 U.S. (6 How.) 344, 392 (1848) (Nelson, J.) (holding five to two that a contract made on land for carriage of goods by sea was maritime, despite English precedents, because the service was "a maritime service, to be performed upon" waters within the admiralty jurisdiction).

172. Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 86 (1809); *see* Currie, *Federal Courts, 1801-1835*, *supra* note 2, at 675-79.

173. 7 U.S. (3 Cranch) 267 (1806); *see* Currie, *Federal Courts, 1801-1835*, *supra* note 2, at 674-75.

174. *Strawbridge*, 7 U.S. (3 Cranch) at 267.

175. *See* J. FRANK, JUSTICE DANIEL DISSENTING 225 (1964).

176. 43 U.S. (2 How.) 497 (1844).

177. On the background of *Letson* and related cases, see 5 C. SWISHER, *supra* note 4, at 463 (noting also that on the apparent date of decision of *Letson* "only Justices Story, McLean, Baldwin, Wayne and Catron were present"); C. SWISHER, *supra* note 56, at 390. *See also* G. HENDERSON, *supra* note 3, at 60.

178. *Letson*, 43 U.S. (2 How.) at 555. The Court correctly added that the earlier decisions seemed difficult to reconcile with Bank of United States v. Planters' Bank, 22 U.S. (9 Wheat.) 904, 910 (1826), which had held that a suit against a corporation in which a state was a shareholder was not a suit against the state.

"A corporation created by a state," wrote Wayne, "seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state."[179] This conclusion was essentially as unsupported as Marshall's contrary assertion thirty-five years before.[180] Wayne did cite Coke for the proposition that corporations were sometimes to be treated as "inhabitants."[181] He also cited *Deveaux* itself to show that this treatment was appropriate " 'when the general spirit and purposes of the law requires it,' " and Wayne added that "the spirit and purposes of the law require[d] it" in the case before him.[182] Alas, he omitted to say why; though noting that a corporation shared with flesh-and-blood citizens the ability to contract, to sue, and to be sued,[183] he did not relate these facts to the "spirit and purposes" of the diversity clause.[184]

Grier did somewhat better when more or less reaffirming *Letson* in the 1854 case of *Marshall v. Baltimore & Ohio Railroad*,[185] quoting from an earlier Catron opinion that argued that in the absence of federal authority outsiders would " 'be compelled to submit their rights' " to local judges and juries " 'and to contend with powerful corporations, where the chances of impartial justice would be greatly against them.' "[186] Unfortunately, Catron had dissociated himself from the implications Grier later tried to draw from this passage,[187] observing that he had only been making *Deveaux*'s point that state incorporation laws could not "repeal the Constitution" by precluding jurisdiction when all relevant members of the corporation were diverse to the opposing

179. *Letson*, 43 U.S. (2 How.) at 555.

180. *Deveaux*, 9 U.S. (5 Cranch) at 86; *see also* Currie, *Federal Courts, 1801-1835*, *supra* note 2, at 675-77.

181. *Letson*, 43 U.S. (2 How.) at 558-59.

182. *Id.* at 559.

183. *Id.* at 558.

184. He did say citizens should not be able to "exempt themselves" from federal jurisdiction by incorporating, *id.* at 552, but that problem had already been settled by *Deveaux*. *See* Currie, *Federal Courts, 1801-1835*, *supra* note 2, at 678. The problem in *Letson* was that the complete diversity rule would have deprived the court of jurisdiction if the railroad had *not* been incorporated. Indeed, one might have invoked *Deveaux* to support a *denial* of jurisdiction in *Letson*: citizens also ought not to lose their *exemption* from federal jurisdiction by virtue of incorporation.

185. 57 U.S. (16 How.) 314 (1853).

186. *Id.* at 327 (quoting Rundle v. Delaware & Raritan Canal Co., 55 U.S. (14 How.) 80, 95 (1853)(concurring opinion)); *see also Marshall*, 57 U.S. (16 How.) at 329 (arguing that corporations themselves needed the protection of "an impartial tribunal" in other states, where local prejudices or jealousy might injuriously affect them). Grier also quoted Hamilton's explanation that diversity jurisdiction was a means of enforcing the privileges and immunities protected by article IV. *Id.* at 326 (citing THE FEDERALIST No. 80 (A. Hamilton)).

187. *See Marshall*, 57 U.S. (16 How.) at 338 (Catron, J.).

party.[188] Grier's point would have seemed stronger had he explicitly noted that the existence of undisclosed owners or directors from outside the state seems unlikely to diminish the probability that local tribunals may unduly favor local corporations[189]—the point seems far less obvious than what Taney left unsaid in *The Genesee Chief*.

Ironically, Grier began his *Marshall* opinion with a solemn declaration that "[t]here are no cases, where an adherence to the maxim of '*stare decisis*' is so absolutely necessary to the peace of society, as those which affect retroactively the jurisdiction of courts."[190] This was precisely the opposite of what the Court said two terms earlier in *The Genesee Chief*,[191] to which Grier naturally made no reference. Grier's point also seemed especially inappropriate because *Letson*, the very decision he now pronounced immutable, had itself unceremoniously discarded another jurisdictional precedent.[192] Worse still, Grier went on to modify the very decision to which he protested he had to adhere: instead of deeming the corporation itself an article III citizen, as *Letson* had reasonably enough done, the Court indulged in a patently fallacious irrebuttable "presum[ption]" that the "persons who act under these [corporate] faculties, and use this corporate name," were "resident in the State which is the necessary *habitat* of the corporation."[193]

188. *See Rundle*, 55 U.S. (14 How.) at 95. In both opinions Catron made it clear he considered the relevant members to include only "the president and directors," and not the shareholders. *Marshall*, 57 U.S. (16 How.) at 338; *Rundle*, 55 U.S. (14 How.) at 95. The majority in *Marshall* seemed to agree: stockholders were to be ignored because they were "not really parties," and their "representatives" were similarly irrelevant because the law conclusively "presumed" them to live in the state of incorporation. *See Marshall*, 57 U.S. (16 How.) at 328-29; Comment, *Limited Partnerships and Federal Diversity Jurisdiction*, 45 U. CHI. L. REV. 384, 405-06 (1978). Earlier decisions were less clear on this point. *Deveaux* had spoken vaguely of "members," 9 U.S. (5 Cranch) at 86, 91-92, which Professors Hart and Wechsler without explanation took to mean stockholders. *See* H. HART & H. WECHSLER, *supra* note 47, at 1085. Similarly, *Letson* spoke interchangeably of "members" and of "corporators," *see, e.g.*, *Letson*, 43 U.S. (2 How.) at 508-10, and a decision between *Deveaux* and *Letson* had refused jurisdiction because of the citizenship of two individuals fuzzily denominated as "stockholders *and* corporators." Commercial & R.R. Bank v. Slocomb, 39 U.S. (14 Pet.) 60, 63 (1840)(emphasis added).

189. *See* Comment, *supra* note 188, at 409 (limiting the observation to those "only beneficially interested").

190. *Marshall*, 57 U.S. (16 How.) at 325.

191. *See supra* text accompanying notes 161-63.

192. Grier could have argued—but did not—that it was more serious to overrule a decision upholding jurisdiction than to overrule one denying it; nineteenth-century doctrine seems to have freely allowed collateral attack on judgments for want of jurisdiction. *See* Thompson v. Whitman, 85 U.S. (8 Wall.) 457 (1874). As an additional irony, one of the cases Grier managed to insist could not be abandoned was *Bank of United States v. Deveaux*, whose restrictive reasoning, as embodied in a companion decision, *Letson* had already overruled. *Letson*, 43 U.S. (2 How.) at 554-56.

193. *Marshall*, 57 U.S. (16 How.) at 328. Catron, Daniel, and Campbell dissented. For a more recent and vigorous attack on the presumption, see McGovney, *A Supreme Court Fiction:*

By means foul or fair, therefore, the Court under Taney frankly departed from constitutional precedent in extending both admiralty and diversity jurisdiction beyond the limits set by Story and Marshall. The famous 1842 decision in *Swift v. Tyson*,[194] moreover, holding (in the apparent teeth of a federal statute) that federal courts in diversity cases could ignore state decisional law on "general commercial" matters, was another startling leap beyond Marshall precedents, which appeared to deny the existence of any federal common law.[195] Story's opinion in *Swift* did not discuss the Constitution, but from a modern perspective he seems to have assumed that the grant of judicial power empowered the federal diversity court to make law.[196] The Court would hold as much in later admiralty cases,[197] but Story's successors were to reject this assumption a century later when *Swift* was finally overruled.[198]

Corporations in the Diverse Citizenship Jurisdiction of the Federal Courts, 56 HARV. L. REV. 853 (1943). See also G. HENDERSON, *supra* note 3, at 62-63, explaining the presumption as a means of quieting the fear that *Letson* might result in privileges and immunities for foreign corporations under article IV despite the holding of Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839), discussed *supra* notes 3-19 and accompanying text. *Cf. Marshall*, 57 U.S. (16 How.) at 352-53 (Campbell, J., dissenting) (discussing *Letson* and questioning "when the mischief will end"). Grier emphasized that the presumption could have no such consequence by reaffirming *Bank of Augusta*'s statement that a corporation had no existence outside its charter state. *Marshall*, 57 U.S. (16 How.) at 328. Because *Bank of Augusta* had explicitly held that diversity precedents did not govern privileges and immunities cases, the fear that *Letson* would be imported into article IV seems exaggerated. It certainly highlighted the distinction between the two clauses, however, and in neither *Letson* nor *Marshall* did the Court find it necessary to explain the consistency of its conclusion with *Bank of Augusta*.

194. 41 U.S. (16 Pet.) 1 (1842), *overruled*, Erie R.R. v. Tompkins, 304 U.S. 64, 79-80 (1938) (state decisional laws constitute rules of decision in diversity jurisdiction cases in federal courts).

195. *See* United States v. Coolidge, 14 U.S. (1 Wheat.) 415 (1816); United States v. Hudson, 12 U.S. (7 Cranch) 32 (1812); *see also* Currie, *Federal Courts, 1801-1835*, *supra* note 2, at 685-86; *cf.* Kitch, *Regulation and the American Common Market*, in A. TARLOCK, REGULATION, FEDERALISM, AND INTERSTATE COMMERCE 9, 25 (1981) (by making recognition of foreign corporations optional, and concurrently opening to them federal courts taking an independent view of state law, the Court in *Swift*, *Letson*, and *Bank of Augusta* created "a judicial program of voluntary commercial integration"—"while the federal courts recognized the paramount power of the states, they tendered to the states a system of uniform national commercial law, which the states were free to reject").

196. But see the interesting argument in R. BRIDWELL & R. WHITTEN, THE CONSTITUTION AND THE COMMON LAW 66-67 (1977), that the process of determining commercial customs was not viewed as lawmaking at the time of *Swift*.

197. *See, e.g.*, Southern Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917); *see also* Currie, *supra* note 162, at 158-64.

198. *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938). The generally accepted purpose of the diversity jurisdiction of affording an unbiased forum, *see, e.g., Deveaux*, 9 U.S. (5 Cranch) at 87, does not support Story's assumption; like the transfer provision of 28 U.S.C. § 1404(a) (1976), *see* Van Dusen v. Barrack, 376 U.S. 612, 616-18 (1964), diversity seems designed to provide another court, and not another body of law. *Cf.* Allstate Ins. Co. v. Hague, 449 U.S. 302, 309 (1981)(citing with apparent approval Home Ins. Co. v. Dick, 281 U.S. 397 (1930), which held a state court could

With respect to other issues regarding the federal courts the Taney period was relatively quiet.[199] One unforgettable diversity decision, however, remains for discussion, and because it also resolved an important issue of substantive congressional power, it is treated in the following section.

III. CONGRESSIONAL AND PRESIDENTIAL POWERS

A. Scott v. Sandford.

Dred Scott, a Missouri slave, accompanied his master first to Illinois, where slavery did not exist, and then to Fort Snelling in what is now Minnesota, where slavery had been forbidden by the Missouri Compromise.[200] Allegedly sold to a New Yorker after returning to Missouri, Scott brought a diversity action in federal court claiming his freedom. The Supreme Court dismissed for lack of jurisdiction, and a majority of the Justices found Congress had no power to outlaw slavery in territories acquired by the Louisiana Purchase.[201] The best known

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not consistently with due process apply its own law to a controversy with wholly foreign contacts); D. CURRIE, FEDERAL COURTS: CASES AND MATERIALS 395 (3d ed. 1982)(*Erie* may be "an application of the principle that a disinterested forum may not frustrate the policies of an interested State").

199. The Court reaffirmed Congress's power to exclude diversity cases created by assignment, *see* Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850), and the impropriety (on statutory grounds) of deciding claims subject to executive review, *see* United States v. Ferreira, 54 U.S. (13 How.) 40 (1852). The Court also respected Jay's dictum that the United States could not be sued without its consent, *see* United States v. McLemore, 45 U.S. (4 How.) 286 (1846), and narrowly construed mandamus to avoid undermining this immunity. *See* Reeside v. Walker, 52 U.S. (11 How.) 272 (1850); Brashear v. Mason, 47 U.S. (6 How.) 92 (1848). For the first time the Court rejected a case as collusive in Lord v. Veazie, 49 U.S. (8 How.) 251 (1850), by holding a feigned dispute not a "controversy" within article III. In a split decision it also upheld the standing of a state as owner of roads and canals to challenge a bridge that reduced its toll revenues. Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1852). The only surprise not already mentioned came when the Court, in reaffirming *Marbury*'s limits on the original jurisdiction, refused to review a military conviction on the ground that the military commission that had entered it was not a judicial body. *See Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1864).

200. Act of Mar. 6, 1820, ch. 22, § 8, 3 Stat. 545, 548:

> [I]n all that territory ceded by France to the United States, under the name of Louisiana, which lies north of thirty-six degrees and thirty minutes north latitude, not included within the limits of [Missouri], . . . slavery and involuntary servitude, otherwise than in the punishment of crimes, . . . is hereby, forever prohibited: *Provided always*, That any person escaping into the same, from whom labour or service is lawfully claimed, in any state or territory of the United States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labour or service as aforesaid.

201. 60 U.S. (19 How.) 393 (1857). Among the anomalies associated with the case are that Curtis participated despite the fact that his brother argued for Scott, *see id.* at 399; 5 C. SWISHER, *supra* note 4, at 613-14; that the Missouri Compromise had been repealed in 1854, at least in the Kansas and Nebraska territories where it was most important, Act of May 30, 1854, ch. 59, 10 Stat. 277; that two Justices communicated with President-elect Buchanan about the case while it was pending, 5 C. SWISHER, *supra* note 4, at 615-18; and that Nelson had initially been assigned to dispose of the case without reaching any constitutional questions, *see* D. POTTER, THE IMPEND-

decision of the Taney period, *Scott* has been widely lamented as bad policy and bad judicial politics. What may not be so well recollected is that it was also bad law.[202]

Scott based jurisdiction on the allegation that he was a citizen of Missouri suing a citizen of New York. In a nation where individual states do not formally confer citizenship, the statutory and constitutional references to "citizens" of different states are hardly self-defining.[203] To the extent that diversity jurisdiction is based upon a fear of state court bias,[204] one might expect the test to be whether the party lives in another state.[205] To the extent that the clause was meant to avoid the risk that one state might take umbrage at the maltreatment of its people in another, one might expect the test to be, as in respect to citizens of "foreign States" under the same article, whether the party is deemed a citizen by the state.[206] Without considering either of these alternatives, however, Taney began his "opinion of the court" with the surprising conclusion that the question was whether Scott was a citizen *of the United States*.[207]

Decisions involving aliens before and after *Scott* have held that nationality rather than domicile governs *foreign* citizenship for diver-

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ING CRISIS 1848-1861, at 272-74 (1976); 5 C. SWISHER, *supra* note 4, at 619; 2 C. WARREN, *supra* note 56, at 293-94. Much of the copious literature is listed, and some of the better pieces reprinted, in THE DRED SCOTT DECISION: LAW OR POLITICS? (S. Kutler ed. 1967). The factual background is given in intricate detail in W. EHRLICH, THEY HAVE NO RIGHTS: DRED SCOTT'S STRUGGLE FOR FREEDOM 9-134 (1979), and in V. HOPKINS, DRED SCOTT'S CASE 1-23 (1951). For a thorough and thoughtful discussion of all aspects of the controversy, see D. FEHRENBACHER, *supra* note 39.

202. For perceptive contemporaneous legal criticism, see *The Case of Dred Scott*, 20 MONTHLY L. REP. 61 (1858); 85 N. AM. REV. 392 (1857). The most comprehensive modern treatment of the legal issues appears in D. FEHRENBACHER, *supra* note 39.

203. *See, e.g.*, U.S. CONST. art. III, § 2, cl. 1.

204. *See, e.g.*, Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809).

205. The Court has consistently used this test in situations not involving race. *See, e.g.*, Williamson v. Osenton, 232 U.S. 619, 624-26 (1914). It was also the basic position of McLean's dissent: "Being a freeman, and having his domicile in a State different from that of the defendant, he is a citizen within the Act of Congress, and the courts of the Union are open to him." *Scott*, 60 U.S. (19 How.) at 531.

206. *See, e.g.*, Murarka v. Bachrack Bros., 215 F.2d 547, 553 (2d Cir. 1954). *But cf.* Sadat v. Mertes, 615 F.2d 1176, 1183 (7th Cir. 1980)(Egyptian nationality of dual national was not dominant where dual national renounced allegiance to any foreign state). This was close to the position taken by Curtis in dissent: "every free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws" is a citizen for diversity purposes. *Scott*, 60 U.S. (19 How.) at 576; *see also id.* at 582. Curtis's limitation to persons born in the state seems artificial in light of this purpose.

207. *Scott*, 60 U.S. (19 How.) at 404-05. Curtis, dissenting, agreed that this was the question. *Id.* at 571. *But see* D. FEHRENBACHER, *supra* note 39, at 341-46; D. POTTER, *supra* note 201, at 275 ("If state citizenship for Negroes existed, it would apparently qualify them to sue in a federal court under the diversity of citizenship clause, regardless of whether they held federal citizenship or not . . . .").

sity purposes,[208] and that an alien is not a "citizen" of an American state in which he lives.[209] Perhaps recognizing that aliens are covered by a separate provision inapplicable to cases like *Scott*, Taney did not invoke this line of authority. Instead, his argument that federal citizenship was decisive was bound up with one of his reasons for holding that Scott was not a citizen. The naturalization power, Taney argued, had been given to Congress in order to prevent one state from foisting undesirables upon other states as "citizens" entitled to "privileges and immunities" under article IV. This purpose could be achieved only by holding that no one but a citizen of the United States could be a "citizen" of a state under articles III and IV, and that only Congress could confer national citizenship.[210]

This argument was clever, but vulnerable at several points. Although Taney's justification for the naturalization power conformed with that given in the Federalist,[211] as early as 1792 two Justices on circuit, disagreeing with that reading, had held the naturalization power was not exclusive.[212] As Taney noted, the Supreme Court had later said that it was.[213] It had done so however, without discussion, in a context suggesting its opinion turned on a preemptive federal statute, and in a passage unnecessary to the result;[214] years later it had held that the similarly phrased bankruptcy power in the same clause was not exclusive.[215] Moreover, Taney expressly declared elsewhere in *Scott* that Congress could not confer citizenship on American blacks;[216] Curtis

208. *See, e.g.*, Van der Schelling v. U.S. News & World Report, Inc., 213 F. Supp. 756 (E.D. Pa.) (American domiciled abroad not foreign "citizen" or "subject"), *aff'd*, 324 F.2d 956 (3d Cir. 1963), *cert. denied*, 377 U.S. 906 (1964).

209. *See, e.g.*, Breedlove v. Nicolet, 32 U.S. (7 Pet.) 413, 428, 431-32 (1833) (foreign nationals may sue citizens of state where former are domiciled); Psinakis v. Psinakis, 221 F.2d 418, 420, 422 (3d Cir. 1955).

210. *Scott*, 60 U.S. (19 How.) at 405-06, 416-18, 422-23.

211. THE FEDERALIST No. 42 (J. Madison)(not cited by Taney).

212. Collet v. Collet, 2 U.S. (2 Dall.) 294, 296 (C.C.D. Pa. 1792).

213. *Scott*, 60 U.S. (19 How.) at 405; *see* Chirac v. Lessee of Chirac, 15 U.S. (2 Wheat.) 259, 269 (1817) (Marshall, C.J.)(not cited Taney).

214. *See* Currie, *States and Congress, 1801-1835*, *supra* note 2, at 914 (noting *Chirac* in discussion of Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819)).

215. Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819); *see* Currie, *States and Congress, 1801-1835*, *supra* note 2, at 910-16.

216. *Scott*, 60 U.S. (19 How.) at 417-18 (citing no authority). This conclusion forced Taney to distinguish Indians, who had on occasion been made citizens, on the ground that they were "foreign." *Id.* at 403-04. The distinction flatly contradicted what Marshall had held in refusing a tribe the right to sue as a "foreign State." *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), *discussed in* Currie, *Federal Courts, 1801-1835*, *supra* note 2, at 719-22.

observed in dissent that it was somewhat unusual to hold exclusive a federal power that did not exist at all.[217]

Nor was it at all clear that holding blacks "citizens" within article IV would entitle them, as Taney argued, "to enter every other State whenever they pleased, . . . go where they pleased at every hour of the day or night without molestation, . . . hold public meetings upon political affairs, and . . . keep and carry arms wherever they went."[218] The Court had already confirmed in *Conner v. Elliott*,[219] which nobody cited, that article IV outlawed only classifications based on citizenship itself; Taney did not parry Curtis's challenging riposte that mere citizenship would not entitle anyone to privileges for which he lacked other requisite qualifications such as age, sex, or race.[220] Finally, even if Taney's arguments demonstrated that the states could not create new citizens for purposes of article IV, it did not necessarily follow that they could not do so for purposes of article III. Taney himself had explicitly refused in *Bank of Augusta v. Earle*[221] to follow a diversity precedent in determining an identical question of privileges and immunities,[222] and his successors would build on this refusal by holding a corporation not a citizen under article IV, though it effectively was one under article III.[223]

Because no one argued that Scott had been a "citizen" while he was a slave, all the Court needed to say was that no state could make him a citizen thereafter. Taney at least had a plausible, though tenuous argument to that effect, but, perhaps because of the way the jurisdictional plea was phrased,[224] he insisted on arguing that *no* person descended from an American slave had ever been a citizen for article III purposes. Other than people naturalized by the federal government, said Taney, United States citizens included only descendants of citizens of the states at the Constitution's adoption, and, Taney continued,

217. *Scott*, 60 U.S. (19 How.) at 578-79. Phrased differently, this objection becomes less compelling: it is not unthinkable that the Framers would simultaneously limit federal power and exclude states from the field entirely.

218. *Id.* at 417.

219. *See supra* notes 20-27 and accompanying text.

220. *Scott*, 60 U.S. (19 How.) at 582-84. Curtis's argument suggests that a black citizen of one state could be enslaved in another, which seems hard to square with the apparent purposes of article IV. Reconciling the rejection of this conclusion with the neutrality principle correctly established in *Conner*, however, was a difficult problem which Taney made no effort to resolve.

221. 38 U.S. (13 Pet.) 519 (1839).

222. *See supra* text accompanying notes 2-19.

223. *See* D. FEHRENBACHER, *supra* note 39, at 355-56; *compare* Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869), *with* Marshall v. Baltimore & O.R.R., 57 U.S. (16 How.) 314 (1853).

224. The plea in abatement urged that Scott was not a citizen "because he is a negro of African descent; his ancestors were of pure African blood, and were brought into this country and sold as negro slaves." *Scott*, 60 U.S. (19 How.) at 396-97.

blacks had been citizens of none of the states at that time.[225] Disputing the premise as well as the conclusion,[226] Curtis cited, among other authorities, an early North Carolina case explicitly declaring liberated slaves "citizens of North Carolina."[227] Curtis also demolished Taney's counterexamples: laws discriminating against blacks no more disproved citizenship than did those disadvantaging married women, and an Act of Congress limiting militia service to "white male citizen[s]"[228] implied, if anything, that there might be black citizens as well.[229]

Taney's arguments against the citizenship of free blacks thus left a good deal to be desired.[230] He has also been widely pilloried for going on to hold the Missouri Compromise unconstitutional: a court without jurisdiction, as many have said in criticism of *Marbury v. Madison* as well,[231] cannot properly decide the merits.[232] The validity of the Compromise, however, was also relevant to jurisdiction. As Taney said, if Congress could not abolish slavery in the territories, Scott remained a slave, and "no one supposes that a slave is a citizen of the State or of the United States."[233] Strong arguments remain that Taney should have been content with a single ground for finding a lack of jurisdiction. With two Justices dissenting and four others declining to decide whether the descendants of slaves could be citizens, however, Taney seems to have spoken for only three Justices on that issue.[234] Without

225. *Id.* at 406-16, 419-22.

226. *See supra* note 206.

227. *Scott*, 60 U.S. (19 How.) at 573 (citing, inter alia, State v. Manuel, 20 N.C. (3 & 4 Dev. & Bat.) 114 (1838)). The issue in *Manuel* was whether certain guarantees in the state constitution were inapplicable to free blacks because they were not citizens. The North Carolina court said the provisions applied to people who were not citizens but added that free blacks had been citizens of North Carolina since the revolution. *Manuel*, 20 N.C. (3 & 4 Dev. & Bat.) at 120. Professor Swisher termed Curtis's evidence on this point "devastating." 5 C. SWISHER, *supra* note 4, at 628; *see also* J. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 328 (1978).

228. Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271, *cited* (with a minor inaccuracy) *in Scott*, 60 U.S. (19 How.) at 587.

229. *Scott*, 60 U.S. (19 How.) at 583, 586-87 (also effectively refuting other examples). Similarly, constitutional and statutory provisions recognizing that *some* blacks were slaves, for example, the importation clause of article 1, § 9, and the fugitive slave clause of article IV, cited by Taney, 60 U.S. (19 How.) at 411, said nothing about the status of others who were not. *See also* D. FEHRENBACHER, *supra* note 39, at 351-52, 361.

230. Nor were they new arguments. For their antecedents, including an 1832 opinion by Taney as Attorney General, see D. FEHRENBACHER, *supra* note 39, at 64-73; 5 C. SWISHER, *supra* note 4, at 506-07.

231. *See generally* Currie, *Federal Courts, 1801-1835*, *supra* note 2, at 651 & n.41.

232. *See, e.g.*, D. POTTER, *supra* note 201, at 281-82, and authorities cited therein. Curtis made the same accusation in his dissent. *See Scott*, 60 U.S. (19 How.) at 589.

233. *Scott*, 60 U.S. (19 How.) at 427.

234. Wayne joined Taney's opinion in toto, *id.* at 454, and Daniel agreed that a descendant of slaves was not a citizen, *id.* at 475-82. Nelson and Campbell expressly left the issue open, *id.* at 458 (Nelson, J.), 493 (Campbell, J.), and Grier said he agreed with Taney that Scott was still a

the conclusions of Grier and Campbell that Scott remained a slave,[235] apparently no majority would have existed for a decision against jurisdiction.[236]

On the question whether Scott was still a slave the Justices produced an appalling cacophony of reasons. The most obvious basis for finding Scott not free was, as Taney at one point suggested, that a Missouri court had already so held;[237] but Daniel responded devastatingly that res judicata, an affirmative defense, had not been pleaded.[238] Nelson based his opinion solely on the ground that Missouri law governed the status of an alleged slave resident in Missouri, and that under that law Scott remained a slave.[239] On this narrow point Nelson had the support of three other Justices[240] and a Supreme Court precedent that was not easy to distinguish;[241] it was indeed gratuitous that those three

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slave, *id.* at 469. Catron argued that the defendant had waived the broader issue by pleading over on the merits. *Id.* at 518-19. Taney and Daniel, disagreeing, properly pointed to precedents holding that subject matter jurisdiction could be investigated at any time. *Id.* at 400-03 (Taney, C.J.), 472-75 (Daniel, J.). Professor Fehrenbacher argues that because Taney's opinion purported to be that of the Court, concurring Justices should be taken to have agreed with everything in the opinion which they did not disclaim. D. FEHRENBACHER, *supra* note 39, at 326-30. I read four of them, however, as having disclaimed Taney's views on black citizenship in general. More troublesome is the fact that neither Grier nor Campbell announced his views from the bench. *See id.* at 315. They certainly left the impression at the time that they accepted everything Taney said, and withdrawing that support after the decision had been announced was questionable.

235. Both Grier and Campbell agreed with Taney and Wayne that because Scott remained a slave there was no jurisdiction. *Id.* at 469 (Grier, J.), 517-18 (Campbell, J.).

236. Nelson and Catron purported to decide only the merits. *Scott*, 60 U.S. (19 How.) at 458 (Nelson, J.), 519 (Catron, J.). Daniel's discussion of the slavery issue appeared to go only to the merits. *Id.* at 482-92. For criticism of the argument that the slavery issue should not have been decided, see D. POTTER, *supra* note 201, at 276-84 (observing that the dictum label enabled critics to reconcile defiance of the decision with their general respect for law by depriving the pronouncement of "ordinary judicial force"); Corwin, *The Dred Scott Decision, in the Light of Contemporary Legal Doctrines*, 17 AM. HIST. REV. 52, 55-59 (1911); Hagan, *The Dred Scott Decision*, 15 GEO. L.J. 95, 107-09 (1927).

237. *Scott*, 60 U.S. (19 How.) at 453-54; *see* Scott v. Emerson, 15 Mo. 576, 585 (1852)(Missouri court opinion).

238. *Scott*, 60 U.S. (19 How.) at 492-93. The judgment also may not have been sufficiently final because the state proceeding had been remanded to the trial court and was awaiting the federal decision. *See id.* at 453 (Taney, C.J.).

239. *Id.* at 459-68.

240. *See id.* at 455 (Wayne, J.), 469 (Grier, J.), 483-88 (Daniel, J.). Taney, *id.* at 452-54, Campbell, *id.* at 493-500, and Catron, *id.* at 519, used the same argument to dismiss the relevance of Scott's stay in Illinois, but all three seemed to base their decision with respect to the territorial stay solely on the invalidity of the Compromise.

241. *See* Strader v. Graham, 51 U.S. (10 How.) 82, 94 (1851) (Taney, C. J.)(refusing to review a Kentucky decision holding that a trip to Ohio had not freed Kentucky slaves: "It was exclusively in the power of Kentucky to determine for itself whether their employment in another State should or shonld not make them free on their return.").

Technically, which state's law was determinative was irrelevant to the Supreme Court's jurisdiction in *Strader*. Moreover, unlike *Strader*, *Scott* arose in a federal court, which the dissenters argued was free to make its own decision, *Scott* 60 U.S. (19 How.) at 593, 603-04 (Curtis, J.,

went on to join Taney, Campbell, and Catron in declaring the Compromise unconstitutional.

Once more, Taney's "opinion of the Court" label is misleading, for there seems to have been no consensus as to *why* Congress had no power to outlaw slavery in the area to which Scott had been taken. Apparently joined only by Wayne and Grier,[242] Taney began by arguing that the article IV authority to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"[243] extended only to those territories already within the

dissenting); it has also been argued that the federal law involved in *Scott* was applicable without regard to state choice-of-law principles by virtue of the supremacy clause, Hagan, *supra* note 236, at 110. *Strader*, however, had also rejected an argument based on the Northwest Ordinance, not only because the Ordinance had ceased to be law when Ohio became a state, but also because it had never had extraterritorial effect. *Strader*, 51 U.S. (10 How.) at 94-97. This meant that *Strader*'s choice-of-law principle was not dictum but an alternative holding, that it applied to federal laws, and that it governed a lower federal court.

There remained the argument that the rule should be different in Scott's case because his master had been domiciled in free territory, but the Missouri court had already rejected that argument in Scott's earlier suit. *See* Scott v. Emerson, 15 Mo. 576 (1852). On the question whether a federal court would be free to ignore the Missouri decision, see *Scott*, 60 U.S. (19 How.) at 603 (Curtis, J., dissenting), shakily arguing, after conceding that the question was one of Missouri law, *id.* at 594, that federal courts were entitled to iguore state decisions involving "principles of universal jurisprudence" outside the commercial field. *See also id.* at 563 (McLean, J., dissenting), 604 (Curtis, J., dissenting)(invoking the questionable decision in Pease v. Peck, 59 U.S. (18 How.) 589, 599 (1855), that when (as evidently in *Scott*) "the decisions of the state court are not consistent, we do not feel bound to follow the last"); *Scott*, 60 U.S. (19 How.) at 466-67 (Nelson, J.)(finding the state decisions basically consistent and arguing, without mentioning *Pease*, that a state court was free to change its mind). *See generally* Currie, *Contracts and Commerce, 1836-1864*, *supra* note 1, at 493-95 (discussing Gelpcke v. Dubuque, 68 U.S. (1 Wall.) 175 (1864)); *supra* notes 122-51 and accompanying text (discussing Luther v. Borden, 48 U.S. (7 How.) 1 (1849)). Curtis finally argued that by consenting to Scott's territorial marriage his master had freed him, and that Missouri thus would impair the marriage contract in violation of article I, § 10 by declaring him a slave, *Scott*, 60 U.S. (19 How.) at 599-603; but because freedom was a consequence of the contract and not part of its obligation, and because the contract clause appeared inapplicable to judicial decisions, *see* Currie, *Contracts and Commerce, 1836-1864*, *supra* note 1, at 495 (discussing *Gelpcke v. Dubuque*), this contention seems rather strained. The otherwise highly critical comment in the *Monthly Law Report* supported Nelson's opinion. *See The Case of Dred Scott*, 20 MONTHLY L. REP. 61, 110 (1858). For an informative discussion of the complex choice-of-law issues and a criticism of Nelson that seems to underplay both the Northwest Ordinance part of *Strader* and the obligation of federal courts to follow state court decisions, see D. FEHRENBACHER, *supra* note 39, at 50-61, 260-62, 385-86, 390-94.

242. *See Scott*, 60 U.S. (19 How.) at 454 (Wayne, J.), 469 (Grier, J.). Catron expressly relied on the territorial clause for power to govern areas outside the 1789 boundary. *See id.* at 523. Campbell, who devoted his opinion to a narrow interpretation of that clause, said it "comprehends all the public domain, wherever it may be." *Id.* at 509. Daniel's apparent belief that the territorial clause provided the only argument for congressional authority suggests he did not take Taney's alternative thesis seriously. *See id.* at 488-89. Nelson presented his nonconstitutional thesis with the apparently exclusive observation that this thesis represented "the grounds upon which" he had "arrived at" his conclusion. *Id.* at 457.

243. U.S. CONST. art. IV, § 3, cl. 2.

country in 1789.[244] Because the language of the clause was general and the need for "Rules and Regulations" was just as great in the newly acquired territory, Taney's construction seems singularly unpersuasive;[245] he might as convincingly have argued that the ex post facto clause applied only to the thirteen original states. Not only did Taney inconsistently acknowledge that new states could be admitted from the area purchased from France,[246] but, as Curtis noted,[247] Taney destroyed the force of his own argument by conceding that Congress could govern that territory as an incident of its power to admit it to statehood.[248] Daniel and Campbell argued that the power to make rules and regulations was not a general power to govern;[249] Curtis observed that similar language in the commerce clause had already re-

244. *Scott*, 60 U.S. (19 How.) at 432-46. Taney correctly noted that the Court had left this question open in American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 542 (1828), where Marshall equivocated concerning the source of authority to set up courts for Florida. *Scott*, 60 U.S. (19 How.) at 442-43. It was embarrassing for Taney that Wayne had said for a unanimous Court in Cross v. Harrison, 57 U.S. (16 How.) 164, 192-93 (1853), invoked by Catron, *Scott*, 60 U.S. (19 How.) at 523, that article IV gave Congress power to govern California. That case implicated no act of Congress, however, so the statement was dictum. *Cf.* 1 J. KENT, COMMENTARIES ON AMERICAN LAW 384 (4th ed. New York 1840)(1st ed. New York 1826)(giving article IV as the source of the territorial power in a discussion of new as well as original territories).

245. *See Scott*, 60 U.S. (19 How.) at 611-14 (Curtis, J., dissenting); *cf.* D. FEHRENBACHER, *supra* note 39, at 367-68 (construction "bizarre" and "eccentric"); D. POTTER, *supra* note 201, at 277 (Taney's construction of article IV "tortured").

246. *Scott*, 60 U.S. (19 How.) at 447.

247. *Id.* at 623-24.

248. *Id.* at 446-49. Taney apparently hoped in this way to circumvent the precedent of the Northwest Ordinance, which had prohibited slavery in an area owned before the Constitution was adopted, but he gave no satisfactory reason for thinking the authority he found implicit in the statehood clause narrower than the power in the territorial provision. Daniel was on a sounder ground in arguing that the Ordinance itself was unconstitutional, *see id.* at 490-92, because the Articles of Confederation, under which the Ordinance was enacted, contained no provision remotely resembling article IV's authority to adopt regulations for territories. *See id.* at 608 (Curtis, J., dissenting) (this consideration entitled "to great weight"). As Curtis pointed out, however, Congress had effectively reenacted the Ordinance in 1789 under the new Constitution. *See id.* at 616-17. Catron distinguished the Ordinance, *see id.* at 522-23, on the basis of Tucker's argument that it had been approved not under article IV, but under article VI's provision that "All . . . Engagements entered into, before the Adoption of the Constitution, shall be as valid against the United States under this Constitution, as under the Confederation." U.S. CONST. art. VI, cl. 1; *see* St. G. Tucker, 1 *Appendix to Volume First. Part First. of Blackstone's Commentaries* 280, in 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (St. G. Tucker ed. Philadelphia 1803 & photo. reprint 1965).

249. *See Scott*, 60 U.S. (19 How.) at 489-90 (Daniel, J.)(no power "to impair the civil and political rights of the citizens of the United States" or to "exclude" slaveowners); *id.* at 501, 514 (Campbell, J.):

> [T]he recognition of a plenary power in Congress to dispose of the public domain, or to organize a Government over it, does not imply a corresponding authority to determine the internal polity, or to adjust the domestic relations, or the persons who may lawfully inhabit the territory. . . . [T]he power . . . is restricted to such administrative and con-

ceived its naturally broad interpretation,[250] and Catron dryly added that he had been ordering people hanged on the strength of article IV regulations on circuit for many years.[251]

Catron had two far-fetched theses of his own, which nobody else joined. He relied first on the Louisiana treaty, which assured France that "the inhabitants of the ceded territory . . . shall be maintained and protected in the free enjoyment of their liberty, property, and . . . religion" until "incorporated in the Union of the United States, and admitted . . . to the enjoyment of all the rights, advantages, and immunities, of citizens of the United States."[252] Curtis responded with a number of debatable points about the meaning of the treaty,[253] and with the more telling objection that the supremacy clause gave treaties no precedence over later federal statutes.[254]

Catron's second point was no better:

> The Constitution having provided that "The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States," the right to enjoy the territory as equals was reserved to the States, and to the citizens of the States . . . .

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servatory acts as are needful for the preservation of the public domain, and its preparation for sale or disposition.

See Taney's similar suggestion, *id.* at 436-37, which was unnecessary in light of his conclusion that the power in question applied ouly to the original territories; see also his comparison, *id.* at 440, with the article I, § 8 power of Congress "to exercise exclusive Legislation in all Cases whatsoever" over the District of Columbia. For cogent criticism of these arguments, see D. FEHRENBACHER, *supra* note 39, at 368-70.

250. *Scott*, 60 U.S. (19 How.) at 622-23; *see also id.* at 625-26 (where Curtis pointed out that if slavery lay outside congressional power, there seemed to be no one to define its numerous incidents in the territories).

251. *Scott*, 60 U.S. (19 How.) at 522-23. The territorial clause was little discussed at the Convention. The replacement of Madison's initial proposal of separate clauses authorizing Congress both to "dispose of the unappropriated lands" and to "institute temporary Governments for New States arising therein" by a single clause authorizing "all needful rules and regulations respecting the territory or other property" seems to suggest the propriety of a broad construction. *See* Notes of James Madison (Aug. 18, 1787 and Aug. 30, 1787), *reprinted in* 2 CONVENTION RECORDS, *supra* note 63, at 324, 459.

252. *Scott*, 60 U.S. (19 How.) at 524-26. On this point Catron had the support of William Rawle's treatise, *see* W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 67-68 (2d ed. Philadelphia 1829)(1st ed. Philadelphia 1825); see also Story's ambiguous comment quoted *infra* note 266.

253. *See Scott*, 60 U.S. (19 How.) at 630-32, arguing.that the quoted passage applied only to those inhabiting the territory at the date of the treaty, that it did not say the inhabitants could "go upon the public domain ceded by the treaty, either with or without their slaves," and that it was a temporary provision that expired when Louisiana became a state. McLean added, without explanation, that a provision such as that found by Catron would have been outside the treaty power. *Id.* at 557.

254. *Id.* at 629-30. Congress had repealed treaties by legislation as early as 1798, *see id.*, and its power to do so has been confirmed by more recent decisions. *See* The Chinese Exclusion Case, 130 U.S. 581 (1889); Whitney v. Robertson, 124 U.S. 190 (1888).

> . . . If the slaveholder is prohibited from going to the Territory with his slaves, . . . owners of slave property . . . might be almost as effectually excluded from removing into the Territory . . . as if the law declared that owners of slaves, as a class, should be excluded . . . .[255]

In other words, the privileges and immunities clause ensured slaveowners the same right as anyone else to inhabit the territories. The statute, however, *did* give slaveholders the same right as anyone else, for *no one* was allowed to hold slaves in the territory. Catron might as well have argued that equality entitled burglars to practice their calling in the territories.[256] Worse yet, he could make the clause relevant at all only by misquoting it. Article IV guarantees the citizen the privileges and immunities of citizens "in the several States," not "of the several States."[257] The text shows it to be a protection of outsiders from state discrimination, not a guarantee of equal treatment by Congress.

It remains to explain the ground on which Taney, explicitly joined only by Wayne and Grier,[258] ultimately based his opinion. Having asserted that the Constitution limited Congress's power over the territories, Taney proceeded to give examples. Surely, he argued, Congress could not pass a law abridging the freedom of speech or religion in the territories, or denying the right to bear arms or to trial by jury there, or compelling people there to incriminate themselves.[259] Similarly, "the rights of private property have been guarded with equal care . . . by the fifth amendment . . . , which provides that no person shall be deprived of life, liberty, and property, without due process of law," and

> an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.[260]

Nothing in the Constitution, he added, "gives Congress a greater power over slave property, or . . . entitles property of that kind to less protection than property of any other description. The only power conferred" was to protect the slaveowner's rights; a prohibition on slavery was "not warranted by the Constitution."[261]

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255. *Scott*, 60 U.S. (19 How.) at 527.

256. Compare the discussion of this clause in connection with Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839), and Conner v. Elliott, 59 U.S. (18 How.) 591 (1856) (both cases discussed *supra* notes 3-27 and accompanying text).

257. U.S. CONST. art. IV, § 2, cl. 1.

258. *See supra* note 234.

259. *Scott*, 60 U.S. (19 How.) at 450.

260. *Id.*

261. *Id.* at 452.

Scholars have argued over the meaning of this passage,[262] but it was at least very possibly the first application of substantive due process in the Supreme Court, and in a sense, the original precedent for *Lochner v. New York*[263] and *Roe v. Wade*.[264] Despite Taney's blithe announcement, however, even the threshold question on whether any of the amendments applied to the territories was disputable: fifty years later the Court would hold that they did not apply to certain other territories,[265] and it had already held article III inapplicable to territorial courts in *American Insurance Co. v. Canter*.[266] More importantly, the idea that the due process clause limited the substantive powers of Congress also needed a bit of explaining. On its face the term "due process" seemed to speak of procedural regularity, as the Court had employed it the year before *Scott* in *Den v. Hoboken Land & Improve-*

262. Professor Swisher argued that Taney's due process point was a "suggestion, rather than . . . a necessary link in his argument," and that, much like Campbell, Taney had held Congress had power over a territory "only to the extent of nurturing it into statehood." C. SWISHER, *supra* note 56, at 508; *see also* D. FEHRENBACHER, *supra* note 39, at 377-84. Taney did begin his discussion by defining Congress's authority as "the power to preserve and apply to the purposes for which it was acquired"; by denying that Congress had "a mere discretionary power" over "the person or property of a citizen," as it had in determining the form of territorial government; and by introducing the section in which he discussed due process by stating that "reference to a few provisions of the Constitution will illustrate" the proposition that Congress could "exercise no power . . . beyond what [the Constitution] . . . confers, nor lawfully deny any right which it has reserved." *Scott*, 60 U.S. (19 How.) at 448-50. If due process was only an illustration, however, Taney failed to explain why his implicit power to govern territories did not include the right to legislate on the subject of slavery. He never denied that such laws were related to preserving the territories for eventual statehood, and thus the several paragraphs devoted to the constitutional protection of slave property, *id.* at 450-52, seem to justify the conclusion of such careful observers as Professors Corwin and Potter that the due process clause was the basis of Taney's position. *See* D. POTTER, *supra* note 201, at 276; Corwin, *supra* note 236, at 61-63.

263. 198 U.S. 45 (1905).

264. 410 U.S. 113 (1973).

265. *See, e.g.*, Dorr v. United States, 195 U.S. 138, 146-49 (1904)(defendant not entitled to jury in criminal trial held in the Philippines). The ambiguous and unexplained extension of the civil jury to the Iowa Territory in Webster v. Reid, 52 U.S. (11 How.) 437, 460 (1850), may as likely have rested on the statute setting up the territory, which "extended the laws of the United States" to that area, as on the Constitution itself.

266. 26 U.S. (1 Pet.) 511 (1828); *see* Currie, *Federal Courts, 1801-1835*, *supra* note 2, at 716-19. Thomas Hart Benton's contemporaneous criticism of *Scott* was based on the argument that Congress's power over territories lay wholly outside the Constitution and thus was subject to no limitations whatever. *See* T. BENTON, HISTORICAL AND LEGAL EXAMINATION OF THAT PART OF THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN THE DRED SCOTT CASE, WHICH DECLARES THE UNCONSTITUTIONALITY OF THE MISSOURI COMPROMISE ACT, AND THE SELF-EXTENSION OF THE CONSTITUTION TO TERRITORIES, CARRYING SLAVERY ALONG WITH IT (New York 1857) (citing numerous congressional actions respecting territories that allegedly would have offended the Constitution had it applied). Thus Benton agreed with Campbell's view that article IV applied only to the regulation of federal property, but he and Campbell drew from the same premise opposite conclusions. *See also* 3 J. STORY, *supra* note 14, §§ 1311-1322 (equivocating as to the source of territorial power but finding it unlimited "unless so far as it is affected by stipulations in the cessions," *id.* § 1322, at 198).

ment Co.[267] Still more fundamentally, although *Hoboken*—not cited by Taney—stated the contrary,[268] considerable historical evidence supports the position that "due process of law" was a separation-of-powers concept designed as a safeguard against unlicensed executive action, and forbade only deprivations not authorized by legislative or common law.[269] Finally, Taney did not respond to Curtis's crippling observation that no one had ever thought due process provisions were offended by either federal or state bans on the international or interstate slave trade.[270]

From a lawyer's viewpoint *Scott* was a disreputable performance. The variety of feeble, poorly developed, and unnecessary constitutional arguments suggests, if nothing else, a determination to reach a predetermined conclusion at any price.[271] Curtis's dissent, however, is one of

267. 59 U.S. (18 How.) 272 (1856); *see* D. POTTER, *supra* note 201, at 276 ("Up to that time, due process had been generally regarded as a matter of procedure . . . ."); 3 J. STORY, *supra* note 14, § 1783, at 661 (equating due process with common law procedure); Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265, 272 (1975)(equating "process" with "writs").

268. *Hoboken*, 59 U.S. (18 How.) at 276.

269. *See* Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 (1911); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646 (1952) (Jackson, J., concurring)(juxtaposing article II's command that the President "take care that the Laws be faithfully executed" with the due process clause: "One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther."). The congressional debates on the Bill of Rights reveal no discussion of the due process provision. *See generally* 1 ANNALS OF CONG. (J. Gales ed. 1789); Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 95-100.

270. *Scott*, 60 U.S. (19 How.) at 627. For additional criticism of Taney's due process argument, see D. FEHRENBACHER, *supra* note 39, at 382-84; Corwin, *supra* note 236, at 64-67.

271. Notably, no serious constitutional objections were made to the Missouri Compromise line at the time of its enactment, or for many years thereafter. *See* T. BENTON, *supra* note 266, at 91-97. The long House debate in 1820 concerned the much more doubtful proposal to require Missouri to prohibit slavery *after statehood*; the Compromise itself was accepted essentially without debate by overwhelming majorities, including many Southerners. *See* 35 ANNALS OF CONG. 467-69(1820)(Senate discussion of Compromise); 36 ANNALS OF CONG. 1576-88 (1820)(House discussion of Compromise, including speech of Mr. Kinsey of New Jersey, treating the Compromise line as a Southern proposal). A few Congressmen did incidentally suggest in the debate over the provision respecting slavery after statehood that, as Campbell later argued, article IV applied ouly to the use of federal property. *See, e.g.*, 35 ANNALS OF CONG. 1003 (1820)(Mr. Smyth of Virginia); *id.* at 1160 (Mr. McLane of Delaware). Several Congressmen explicitly added, however, that Congress nevertheless had power to ban slavery in the territories. *See id.* at 940-41 (Mr. Smith of Maryland); *id.* at 1160 (Mr. McLane); *see also id.* at 1031-32 (Mr. Reid of Georgia) (anticipating Catron's treaty argument); 36 ANNALS OF CONG. 1379 (Mr. Darlington of Pennsylvania)(asserting that the power was "generally conceded").

The first serious assault on the principle underlying the Compromise was probably the series of resolutions offered by John C. Calhoun in 1847, CONG. GLOBE, 29th Cong., 2d Sess. 455 (1847), arguing that the states owned the territories in common and that Congress, as their agent, could not discriminate among the states. *See also id.* at App. 244 (Mr. Rhett of South Carolina); *id.* at 876 (Mr. Calhoun, opposing extension of the Compromise line to the Pacific). Daniel's argument in *Scott* echoed this trusteeship idea, but unlike Calhoun and Rhett he based Congress's territorial

the great masterpieces of constitutional opinion-writing,[272] in which, calmly and painstakingly, he dismantled virtually every argument of his variegated adversaries. Along the way, in arguing that no exception should be carved out of Congress's powers "upon reasons purely political,"[273] he also delivered one of my favorite statements on constitutional interpretation:

> [W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.[274]

It was a tragedy but not a surprise that within a year after this decision Curtis went back to Boston to practice law.[275]

B. The Prize Cases.

In 1861, following the purported secession of a number of Southern states, President Lincoln proclaimed a blockade of Southern ports.[276] In 1863, by a five to four vote, the Supreme Court upheld the constitutionality of the proclamations.[277]

Grier's unimpressive majority opinion treated the problem largely as one of "international law,"[278] paying scant attention to what today would appear to be the real question—the consistency of the President's act with the Constitution and laws of the United States.[279] Nel-

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power on article IV. *See supra* notes 249-50 and accompanying text. The historical antecedents of the *Scott* arguments are splendidly treated in D. FEHRENBACHER, *supra* note 39, at 74-235.

272. I have repeatedly referred to it, rather than McLean's pedestrian counterpart, for this reason. McLean's biographer conceded that "Curtis's opinion was much the abler." F. WEISENBURGER, THE LIFE OF JOHN MCLEAN 203 (1937); *see also* D. POTTER, *supra* note 201, at 278.

273. *Scott*, 60 U.S. (19 How.) at 620.

274. *Id.* at 621.

275. *See* Curtis, *Memoir of Benjamin Robbins Curtis, L.L.D.*, *in* 1 A MEMOIR OF BENJAMIN ROBBINS CURTIS 243-44 (B.R. Curtis, Jr. ed. 1879)(saying the "controlling reason" for Curtis's resignation was financial but adding that Curtis "no longer felt that confidence in the Supreme Court which was essential to his useful co-operation with its members"); *see also* 5 C. SWISHER, *supra* note 4, at 636-38.

276. Proclamation No. 4, 12 Stat. 1258 (1861); Proclamation No. 5, 12 Stat. 1259 (1861).

277. The Prize Cases, 67 U.S. (2 Black) 635 (1863). *See generally* 5 C. SWISHER, *supra* note 4, at 879-900; C. SWISHER, *supra* note 56, at 563-65.

278. The Prize Cases, 67 U.S. (2 Black) at 665-68.

279. *See* Currie, *Supreme Court, 1789-1801*, *supra* note 2, at 861; *cf.* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 230 (1796)(Chase, J.)(the obligations international law might impose toward other countries were irrelevant to Virginia's power to confiscate alien property as a domestic matter).

son accurately framed the issue in a literate dissent joined by Taney, Catron, and Clifford: only Congress had the power to declare war.[280]

Grier responded in part with the bald conclusion that Congress "cannot declare war against a State, or any number of States."[281] Even if true, this did not prove that the President could,[282] and Grier admitted the President had no power to "initiate or declare a war either against a foreign nation or a domestic State."[283] The President was, however, "Commander in Chief of the Army and Navy" under article II; Congress had authorized him to call out the armed forces to suppress insurrections; and that, said Grier, was what he had done.[284]

Though buried in a mass of irrelevancies, this seems to be a good argument. Nelson's protest that Congress could not delegate its power to declare war[285] missed the mark; article I shows that *defensive* responsibility can be delegated, as self-preservation demands, by specifically authorizing Congress to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[286] Grier neglected to cite the Convention history that would have placed his conclusion beyond dispute: the original draft empowering Congress to "make" war was altered to the present form on Madison's and Gerry's motion, "leaving to the Executive the power to repel sudden attacks."[287]

Nelson left his most interesting objection for last: putting down an insurrection meant only fighting the insurgents themselves; to make enemies of innocent inhabitants of the territory under rebel control required a declaration of war.[288] Some limit to the presidential power of response does seem necessary to keep it from infringing the constitutional purpose that Congress shall make the basic decisions of war and

280. The Prize Cases, 67 U.S. (2 Black) at 688-90 (Nelson, J., dissenting).

281. *Id.* at 668 (Grier, J.). This conclusion finds no support in the constitutional language and little in its apparent policy; it is hard to see why the Framers would not have wanted Congress to have a say in domestic as well as in international fighting.

282. In view of the argument *supra* note 281, this more probably would mean the United States could never be formally at war with its own constituent parts.

283. The Prize Cases, 67 U.S. (2 Black) at 668.

284. *Id.* This passage calls into question the suggestion in L. TRIBE, *supra* note 14, § 4-6, at 174, that the *Prize Cases* "recognized an inherent executive power . . . to repel an invasion or rebellion."

285. The Prize Cases, 67 U.S. (2 Black) at 693 (Nelson, J., dissenting).

286. U.S. CONST. art. I, § 8, cl. 15. Nelson made nothing of the fact that the Navy instead of the militia enforced the blockade. Because no reason appears why the government should have less authority to use federal rather than state troops in an emergency, the militia seems to have been mentioned to avoid any argument that state officers were outside federal control.

287. Notes of James Madison (Aug. 17, 1787), *reprinted in* 2 CONVENTION RECORDS, *supra* note 63, at 318-19.

288. The Prize Cases, 67 U.S. (2 Black) at 693-95.

peace;[289] subsequent events have illustrated the difficulty of drawing the line.[290] In the context of a massive rebellion within the United States itself, however, the choice of a blockade seems to have been well within the discretion confided the President in choosing the necessary means of defense.[291]

Unfortunately, Grier did not put it quite that way. Whether the crisis required belligerent actions, he said, was for the President alone to decide: "[t]he proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure."[292] If this meant to immunize from judicial scrutiny anything a President might do in the name of pursuing lawful hostilities, it went far indeed; but later Presidents would discover that despite Grier's extreme statement they did not have nearly so much latitude.[293]

C. *Epilogue.*

Compared with *Scott* and the *Prize Cases*, the remaining efforts of the Taney Court with respect to federal legislative and executive power were anticlimactic. As already mentioned in the previous issue of the

289. An attack on a foreign nation helping the rebels, for instance, would appear to cross the line between defensive and offensive action. Compare this argument with the controversy over the bombing of neutral Cambodia during the conflict in Vietnam.

290. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 410-24 (10th ed. 1980)(collecting examples including the capture of American vessels abroad, the effort to rescue American hostages in Iran, the evacuation of Americans and others from Saigon, and of course the Vietnam conflict itself).

291. Grier's alternative holding that Congress had retroactively validated the blockade by subsequent legislation was less convincing. His argument that the ex post facto clause (invoked by Nelson, The Prize Cases, 67 U.S. (2 Black) at 697-98) had no application "in a tribunal administering public and international law," *id.* at 671, sounds almost like an assertion that the Constitution was off during the emergency—a conclusion the Court would emphatically deny a few years later in *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 118-21 (1866). More charitably, Grier may have meant the clause applied only to criminal matters, as the Court (in cases he ignored) had long held. *See* Currie, *Supreme Court, 1789-1801*, *supra* note 2, at 867-69 (discussing Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798)). The proclamation made it unlawful to take ships in and out of Southern ports, however, and that was what the claimants had done. That their punishment was forfeiture of goods does not seem to take the case out of the punitive category. *Cf. Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867) (both decisions striking down laws retroactively disqualifying Confederate sympathizers from certain occupations).

292. The Prize Cases, 67 U.S. (2 Black) at 670. For a later refusal for want of information, expertise, and manageable standards to determine whether a President had gone too far in combating an enemy, see DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973)(mining and bombing of North Vietnam).

293. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)(invalidating seizure of steel mills during Korean War); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866)(invalidating military trial of civilian during Civil War).

Duke Law Journal, the commerce power was construed rather broadly.[294] Similarly, in areas outside the commerce clause the Taney decisions tended to apply Marshall's generous interpretation of the necessary and proper clause, upholding statutes punishing the passing of counterfeit coins,[295] authorizing bankruptcy trustees to pass title free of mortgages,[296] and allowing distraint of the property of a delinquent customs collector.[297] In *Prigg*[298] and *Dennison*[299] the Taney Court even went beyond the necessary and proper clause to sustain the implicit power of Congress to pass legislation implementing the constitutional provisions requiring states to surrender fugitive slaves and fugitives from justice. It found the military had "inherent" authority to determine the pay of its members[300] and could impose tariffs[301] and establish courts[302] in conquered territories; and it held the President had power to make a pardon conditional.[303] Distorted as it was by the corrosive slavery question, *Scott v. Sandford*[304] was the least representative decision of an era otherwise characterized by vigorous judicial support for federal power.[305]

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294. *See, e.g.*, Foster v. Davenport, 63 U.S. (22 How.) 244 (1859); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856); United States v. Marigold, 50 U.S. (9 How.) 560 (1850); United States v. Coombs, 37 U.S. (12 Pet.) 72 (1838)(cases noted in Currie, *Contracts and Commerce, 1836-1864*, *supra* note 1, at 511).

295. United States v. Marigold, 50 U.S. (9 How.) 560 (1850).

296. Houston v. City Bank, 47 U.S. (6 How.) 486 (1848).

297. Den v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856).

298. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842)(discussed *supra* notes 31-57 and accompanying text).

299. Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861)(discussed *supra* notes 60-72 and accompanying text); *see also* Searight v. Stokes, 44 U.S. (3 How.) 151 (1845)(dictum)(resolving in favor of federal power the long-disputed question whether the authority to "establish" post roads included the power to build them).

300. United States v. Eliason, 41 U.S. (16 Pet.) 291 (1842).

301. Cross v. Harrison, 57 U.S. (16 How.) 164 (1854).

302. Leitensdorfer v. Webb, 61 U.S. (20 How.) 176 (1858).

303. *Ex parte* Wells, 59 U.S. (18 How.) 307 (1856).

304. 60 U.S. (19 How.) 393 (1857).

305. As in earlier periods, the Bill of Rights figured hardly at all in the decisions of the Taney period. Cases concerning the scope of the admiralty jurisdiction indirectly involved the seventh amendment, but the amendment did not stand in the way of reinterpreting the maritime clause to suit American conditions. *See supra* text accompanying notes 152-71. The Court's conclusion in Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833), that the taking clause did not apply to the states, was reaffirmed, and applied to other amendments in Withers v. Buckley, 61 U.S. (20 How.) 84 (1858)(taking), Permoli v. New Orleans, 44 U.S. (3 How.) 589 (1845)(religion), Fox v. Ohio, 46 U.S. (5 How.) 410 (1847)(double jeopardy)(alternative holding), and Smith v. Maryland, 59 U.S. (18 How.) 71 (1855)(search and seizure). Moore v. Illinois, 55 U.S. (14 How.) 13, 19-20 (1852), set a lasting precedent in stating that a single act could constitute separate offenses against state and federal authority despite the double jeopardy clause. Gilman v. Sheboygan, 67 U.S. (2 Black) 510, 513 (1863), a diversity case holding that a tax did not offend the taking provision of a state constitution, laid down an explanation that, though based on state precedent, had important

IV. CONCLUSION

Though none of Marshall's successors could rival his unique opportunity to flesh out the skeletal Constitution, Taney's years as Chief Justice also furnished a good number of significant occasions. No era containing such great controversies as *Charles River Bridge*,[306] *Bank of Augusta v. Earle*,[307] *Prigg v. Pennsylvania*,[308] *Luther v. Borden*,[309] *Cooley v. Board of Wardens*,[310] *Ableman v. Booth*,[311] and the *Prize Cases*[312] can be described as uneventful, even apart from *Scott*. A summary of the achievements of the Court over which Taney presided would include a rather generous interpretation of congressional and presidential power (with the glaring exception of *Scott*); a striking expansion of federal judicial authority beyond the boundaries set by the Marshall Court; vigorous enforcement of the contract clause and other express and implied limitations upon the states; and a compromise that settled the festering negative commerce clause debate in a manner destined to protect vital federal interests against state infringement for over a hundred years.

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implications for the similar fifth amendment provision: "That clause . . . refers solely to the exercise, by the State, of the right of eminent domain."

The most interesting Bill of Rights decision apart from *Scott* was Den v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856), sustaining the summary distraint of a customs collector's property for approximately a million dollars he had failed to deliver after extracting it from importers. Equating due process with the "law of the land" clause in the Magna Carta, as he said Coke had done, Curtis announced that the due process clause was "a restraint on the legislative as well as on the executive and judicial powers of the government." *Id.* at 276. The content of due process, he said, was determined by "those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." *Id.* at 277. Plausible decisions construing state law-of-the-land clauses, *see* Corwin, *supra* note 269, contradicted the first of these propositions, and later decisions holding English practice neither a necessary nor a sufficient indicium of due process abandoned the second. *See, e.g.*, Powell v. Alabama, 287 U.S. 45 (1932)(requiring assigned defense counsel despite the absence of English precedent); Hurtado v. California, 110 U.S. 516 (1884)(allowing prosecution by information where English practice required indictment); *see also* G. GUNTHER, *supra* note 290, at 477-78. Finding distraint historically supported, the *Hoboken* Court rejected a fourth amendment argument on the ground that the requirements applicable to warrants had "no reference to civil proceedings for the recovery of debts" any more than to ordinary executions. *Hoboken*, 59 U.S. (18 How.) at 285-86. A little history might have helped support this essentially bare conclusion.

306. Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837); *see* Currie, *Contracts and Commerce, 1836-1864*, *supra* note 1, at 480-82.

307. 38 U.S. (13 Pet.) 519 (1839).

308. 41 U.S. (16 Pet.) 539 (1842).

309. 48 U.S. (7 How.) 1 (1849).

310. 53 U.S. (12 How.) 299 (1852); *see* Currie, *Contracts and Commerce, 1836-1864*, *supra* note 1, at 506-10.

311. 62 U.S. (21 How.) 506 (1859).

312. 67 U.S. (2 Black) 635 (1863).

All of this was accomplished, to be sure, with far more perceptible friction than the Marshall Court had generally allowed itself to exhibit. Unlike Marshall, Taney had no success in silencing colleagues with views of their own, and a comparison of those views with the few separate opinions that did see the light of day under Marshall strongly suggests that the differences of opinion ran much deeper after Marshall's departure. For the Taney Court was a fractious one. Story, McLean, and Wayne, all of whom sat with Marshall, tended to take relatively nationalist positions, as did the later-appointed Curtis; Barbour, Catron, Daniel, Campbell, and Woodbury tended to come out in favor of the states in doubtful cases.[313] Sectional alignments partially clouded this picture: for example, though Wayne managed to find it to the South's advantage to keep the states out of the fugitive slave business, he could not bring himself to find that Congress could forbid slavery in the territories.[314]

On occasion this lack of cohesiveness paralyzed the Taney Court. For ten years the Court sowed hopeless confusion in the commerce clause pasture; its contract clause cases hardly formed a consistent pattern; and *Scott* presented the spectacle of seven Justices with nearly as many rationales for their common conclusion. Under Taney the Court became a gaggle of squabbling prima donnas; whether the fault was his or theirs, Taney never did exhibit Marshall's astounding powers of leadership.

Taney's inability to prevent institutional incoherence contrasts sharply with the exemplary quality of many of his own opinions. Even when he was apparently in error, as in *Charles River Bridge*, his writing was often characterized by an unusual lucidity and economy of style that left little doubt where he stood and why. At his best, as in *The Genesee Chief*[315] and the *License Cases*,[316] Taney was not only clear but also extremely persuasive. Like most of his brethren, he made far greater use of precedent than had Marshall, perhaps because not until his day was there a significant body of precedent to cite. He did on occasion exhibit Marshall's tendency to reach out for unnecessary constitutional issues, as in *Luther* and *Scott*. His *Scott* opinion was a disaster, and thereafter he seemed to lose much of his power; neither his

313. Apart from slavery, the Justices' major disagreements involved public contracts, state powers affecting commerce, and the expansion of admiralty and diversity jurisdiction.

314. A converse instance is the narrow construction of the commerce power rendered by the nationalistic McLean in *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449 (1841)(separate opinion), in order to uphold a state law limiting slavery.

315. The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851).

316. 46 U.S. (5 How.) 504 (1847); *see* Currie, *Contracts and Commerce, 1836-1864*, *supra* note 1, at 499-502.

unexplained contradictions in *Dennison*[317] nor his unfocused and unsupported ramblings in *Ableman* earned him additional garlands. On the whole, however, he was an able and convincing Justice. As his biographer remarked, he would have been remembered as such had not Mr. Sanford allegedly purchased a slave who had once been to Fort Snelling.[318]

Nor was it merely an exceptional longevity that made Taney by far the dominant figure on the Court in his time. Though he assigned the burden of speaking for the majority to others much more frequently than had Marshall, Taney still delivered substantially more Court opinions in constitutional cases than any of his colleagues, including a disproportionate number of the important ones: *Charles River Bridge*, *Bank of Augusta*, *Luther*, *The Genesee Chief*, *Ableman*, and *Dennison*—not to mention *Scott*, in which he invited the blame for what was labeled the Court's opinion. More to the point, the Chief Justice did not lose many battles. In nearly thirty years of constitutional litigation he apparently dissented in only five cases, and in only two of importance.[319] After the squabbling had subsided, the outcome almost always matched what Taney wanted.

The other two important figures in constitutional cases during Taney's tenure were Story and Curtis. More federalist than Marshall, Story was somewhat out of place among his later colleagues, and he expressed his discomfiture by dissenting vehemently from their first three constitutional decisions—although he and Taney soon discovered that they had many views in common.[320] Most of Story's work was substantial and well-crafted. In both *Prigg*[321] and the *Miln*[322] dissent he seemed unconvincing and strained, but his opinions in *Charles River Bridge*[323] and *Briscoe*[324] were among the best in the whole period.[325]

317. Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861).

318. *See* C. SWISHER, *supra* note 56, at 586.

319. The Prize Cases, 67 U.S. (2 Black) 635, 699 (1862); The Passenger Cases, 48 U.S. (7 How.) 283, 464 (1849); *see* Currie, *Contracts and Commerce, 1836-1864*, *supra* note 1, at 502-05.

320. *See* G. DUNNE, *supra* note 55, at 391-92; J. MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 293-94 (1971).

321. *Prigg*, 41 U.S. (16 Pet.) at 626.

322. New York v. Miln, 36 U.S. (11 Pet.) 102, 153 (1837); *see* Currie, *Contracts and Commerce, 1836-1864*, *supra* note 1, at 476-77.

323. *Charles River Bridge*, 36 U.S. (11 Pet.) at 583; *see* Currie, *Contracts and Commerce, 1836-1864*, *supra* note 1, at 481-82.

324. Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257, 328 (1837); *see* Currie, *Contracts and Commerce, 1836-1864*, *supra* note 1, at 477-80.

325. *See* J. MCCLELLAN, *supra* note 320, at 294 (quoting Taney's lament on Story's death that his loss was "utterly irreparable in this generation; for there is nobody equal to him").

It is an enormous pity that Curtis spent only six years on the Court, for in that short time he distinguished himself as the most powerful occupant of the bench. This assessment rests in large part on two of his nine constitutional opinions, *Cooley* and the *Scott* dissent. Although both *Cooley* and his important opinions in *Conner v. Elliott*[326] and *Den v. Hoboken Land & Improvement Co.*[327] show that Curtis shared Marshall's unfortunate inclination to lay down conclusory pronouncements as if he were a lawgiver, he also shared Marshall's rare gift of magisterial style that made this, in its way, convincing. What was more remarkable about *Cooley*, however, were Curtis's ability to bring irreconcilable factions together and his prescient statesmanship: as Marshall had done so often before him, Curtis wrote a constitutional provision that was to last. Most impressive of all of Curtis's efforts, however, was his *Scott* opinion, one of the best examples of legal craftsmanship to be found anywhere in the United States Reports.

These three pretty well exhaust the roster of stars who sat between 1836 and 1864. Perhaps the best of the others was Thompson, like Story a holdover from an earlier era in which he had done much of his best work.[328] Never one to write much for the Court, he displayed strong reasoning powers in his short *Briscoe* concurrence and an admirable sense of restraint for the majority in *Groves*. No extreme nationalist, he was the only Justice to join Story's *Charles River Bridge* dissent in defense of vested rights.

Important for his longevity and the vehemence of his opinions, McLean exhibited more bluster than sound reasoning. He distorted commerce clause precedents to further his nationalist position, let his abolitionist views lead him into inconsistent and unnecessary support for state power in *Groves*, and added very little in his long *Scott* dissent. At times a fierce protector of contracts who found tax exemptions that were invisible to the majority of his brethren, he strangely dissented from the enforcement of mortgage rights in *Bronson*.[329] His best opinion came in *Prigg*, where he alone argued persuasively that the kidnapping law conflicted with either the federal statute or the consti-

326. 59 U.S. (18 How.) 591 (1856).

327. 59 U.S. (18 How.) 272 (1856).

328. *See, e.g.*, Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 292 (1827)(Thompson, J., separate opinion); Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 449 (1827)(Thompson, J., dissenting). *See generally* Currie, *States and Congress, 1801-1835*, *supra* note 2, at 917-948.

329. Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843), *discussed in* Currie, *Contracts and Commerce, 1836-1864*, *supra* note 1, at 483-85; *see, e.g.*, Ohio Life Ins. & Trust Co. v. Debolt, 57 U.S. (16 How.) 416 (1853), *discussed in* Currie, *Contracts and Commerce, 1836-1864*, *supra* note 1, at 492 n.142.

tutional right of discharge. Even in *Prigg*, however, McLean neglected to make clear whether he was concurring or dissenting.[330]

Baldwin managed to write nothing of interest for the Court in a constitutional case, confining himself to a series of mostly tardy concurrences I have already described as long and boring.[331] Wayne, appointed before Taney and still on the Court when Taney died, had remarkably little to show for his tenure.[332] A nationalist except in *Scott*, Wayne deserves notice as a Southerner who cast the decisive vote to uphold Lincoln's blockade in the *Prize Cases*. Barbour, who wrote competently for state authority in *Miln*, was a minor figure who vanished after a handful of years.[333] Catron, whose service substantially coincided with Taney's, wrote barely enough to reveal himself as somewhat more state-minded than the Court and to discredit himself badly in *Scott*. McKinley was a cipher, serving fifteen years and leaving virtually no trace.[334] Daniel, who seemed to care little for legal reasoning, was a knee-jerk antifederalist who dissented regularly in cases involving admiralty, diversity, or contracts and who denied federal power over internal improvements.[335] Nelson was an unimpressive plodder in the mainstream who wrote little over a long period; his chief claim to fame was his unique refusal to reach the constitutional

330. 5 C. SWISHER, *supra* note 4, at 46, confirms the general understanding that McLean, who repeatedly angled for a presidential nomination while on the Bench, "was one of the most politically minded of all the Justices." For detailed discussion of McLean's perennial ambitions, his willingness to make extrajudicial statements, his inability to resist dicta, and his penchant for hard work, see F. WEISENBURGER, *supra* note 272.

331. *See supra* note 87. 5 C. SWISHER, *supra* note 4, at 50-52 & n.53, notes Baldwin's uncertain emotional health and financial difficulties and Taney's fear that the "evil" "temper of Judge Baldwin's opinions . . . will grow" to the point where "[i]t will . . . be necessary . . . to take some step to guard the tribunal from misconstruction."

332. *See generally* A. LAWRENCE, JAMES MOORE WAYNE, SOUTHERN UNIONIST 113-14 (1943)(Wayne lacked the gifts of Story, Taney, Curtis, and Campbell, and his opinions "lack judicial craftmanship," but he was "a diligent, useful and conscientious Justice").

333. For Story's rather approving view of Barbour, see G. DUNNE, *supra* note 55, at 382-83.

334. McKinley officially missed four entire terms (1840, 1843, 1847, and 1850), two on account of "indisposition," one because of an "important session" on circuit, and one for undisclosed reasons. *See* 39 U.S. (14 Pet.) at vii; 42 U.S. (1 How.) at lxxi; 47 U.S. (6 How.) at iii; 49 U.S. (8 How.) at iii. At his death Taney said McKinley had been "faithful and assiduous in the discharge of his duties while his health was sufficient to undergo the labor." 55 U.S. (14 How.) at v; *see also* 5 C. SWISHER, *supra* note 4, at 66-67, 463 (noting in addition his time spent in the business of manufacturing rope). McKinley, says Professor Swisher, "made no significant contribution to legal thinking in any form." *Id.* at 67. *See generally* Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466, 471-73 (1983).

335. *See* J. FRANK, *supra* note 175, at 236, 243, 274 (after 1848 Daniel became a "[S]outhern sectionalist of the most extreme sort"; he dissented alone more than twice as often as any of his contemporaries; though a weak stylist and not so gifted as Curtis, Campbell, and Taney, he was "at least as good as all the rest"); 5 C. SWISHER, *supra* note 4, at 69-70 (describing Daniel as "not untypical of an extreme element in the South in his time"); *see also* G. DUNNE, *supra* note 55, at 383 (Story viewed Daniel as "a man of 'prodigiously small calibre' ").

issue in *Scott*.[336] Woodbury stayed only briefly and had little impact; he was unusually long-winded and relatively state-oriented in admiralty and contract cases.[337] Another mainstream Justice of long service, Grier was notably uninspired. Of his two significant majority opinions, *Marshall*[338] was incomplete on diversity policy and embarrassing on precedent, and the *Prize Cases* seemed largely off the point. Campbell was a more erudite and less extreme version of Daniel who spoke infrequently for the Court before secession, which he had opposed, drew him back to Alabama.[339]

The others—Clifford, Miller, Swayne, Davis, and Field—were appointed late and belong to the following period. Clifford commenced his career with a leap into the natural-law position that the United States could not repeal its own grants,[340] a position he was later to denounce in a related context with some eloquence.[341] Miller began to attract attention with two clever opinions avoiding protection for what others thought were vested rights.[342] Before Taney's death Swayne wrote only two constitutional opinions, one strongly pro-state,[343] the other strongly anti-state,[344] and both essentially lawless. Davis and Field were not heard from at all.

It was a stormy time but one of essential continuity; a time of several great controversies and many small ones; a time of three or four Justices who were of substantial parts and of a number of others who were not.

336. 5 C. SWISHER, *supra* note 4, at 221, terms Nelson "stable, sound, and unspectacular."

337. *See* J. FRANK, *supra* note 175, at 274 (noting with considerable justification that, while Daniel was no stylist, "at his worst he was not as bad as Woodbury").

338. Marshall v. Baltimore & O.R.R., 57 U.S. (16 How.) 314 (1853).

339. 5 C. SWISHER, *supra* note 4, at 450, describes Campbell in the context of his learned historical dissents in the admiralty cases as, with the exception of Story, "probably the outstanding scholar on the Court during the Taney period." *See also* H. CONNOR, JOHN ARCHIBALD CAMPBELL 261 (1920)(describing Campbell's mind as "massive rather than analytical" and calling him "clear in his conceptions, but without imagination"); J. FRANK, *supra* note 175, at 173 ("Campbell did with genius what Daniel did in a work-a-day way, and the two were basically like-minded"). For Campbell's views on secession, see H. CONNOR, *supra*, at 118-19.

340. Rice v. Railroad Co., 66 U.S. (1 Black) 358, 373 (1862)(dictum).

341. Citizens' Savings & Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 667 (1875)(dissenting opinion).

342. Bridge Proprietors v. Hoboken Land & Improvement Co., 68 U.S. (1 Wall.) 116 (1864); Gelpcke v. Dubuque, 68 U.S. (1 Wall.) 175, 207 (1864)(dissenting opinion)(discussed in Currie, *Contracts and Commerce, 1836-1864*, *supra* note 1, at 493-95).

343. Conway v. Taylor's Executor, 66 U.S. (1 Black) 603 (1862).

344. Gelpcke v. Dubuque, 68 U.S. (1 Wall.) 175 (1864).